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In The

Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

Walter J. Hickel, Secretary of the Interior,
Petitioner,

v.

The Oil Shale Corporation and Energy Resources Technology Land, Inc.,
Respondents.

BRIEF FOR THE RESPONDENTS

Statutes and Regulations Involved

Although the petitioner's brief to this Court contains this caption it omits, as did the petition for certiorari, the relevant provision of the Regulations of the Department of the Interior. Section 3420.4 of Title 43, C.F.R. (1969), which was set forth in the respondents' brief in opposition to the petition (p. 4), provides as follows:

> "The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U.S.C. 28), is, with the exception of certain phosphate placer locations, validated by the act of January 11, 1915 (38 Stat. 792; 30 U.S.C. 131), under which regulations were issued March 31, 1915 (Circ. 396), 44 L.D. 46, solely a matter between rival or adverse claimants

> to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."

This regulation has long been in effect. See, *e.g.*, *Regulations*, 37 L. D. 757, 769 (1909); *Regulations*, 49 L. D. 58, 73 (1922).

Statement

This brief is filed on behalf of The Oil Shale Corporation and Energy Resources Technology Land, Inc., who were the plaintiffs in the first to be commenced of the four cases now before this Court.[1] The respondents are the owners of 75 oil shale placer mining claims which were located under the mining laws, prior to the enactment of the Mineral Leasing Act of 1920, in Rio Blanco County, Colorado.[2] The present controversy concerning these claims stems from administrative proceedings between 1928 and 1931 in the Department of the Interior

1. This case was No. 8680 in the District Court and No. 9581 in the Court of Appeals. The other three cases are *Hickel* v. *Umpleby, et al.* (No. 8685 in the District Court and No. 9582 in the Court of Appeals); *Hickel* v. *Napier, et al.* (No. 8691 in the District Court and No. 9583 in the Court of Appeals); and *Hickel* v. *Brown, et al.* (No. 9202 in the District Court and No. 9584 in the Court of Appeals). Separate briefs are being filed in this Court on behalf of the *Umpleby* respondents and, jointly, by the respondents in *Napier* and *Brown*.

2. The Bute claims Nos. 1-19, 21-28 and 30-48; the Camp Bird claims Nos. 1-20; and the Atlas claims Nos. 1-3, 7, 9, 10, 12, 17 and 18. The location certificates showing the dates of location appear in the record (hereinafter cited as "R.") at pp. 2282-2324. Counsel for the Government conceded in the District Court that the respondents have record title (App. 54-55).

References to "App." or to "A." are to the Appendix in this Court, which includes not only portions of the record in this case (pp. 5-341) but also portions of the separate records in *Umpleby* (pp. 342-392), *Napier* (pp. 392-408) and *Brown* (pp. 408-433). By agreement of the parties the evidence common to the four cases was included in the record in this case.

in Contests 11757, 11759 and 11761 which culminated in decisions purporting to declare the claims, or interests in the claims, invalid solely for failure to perform so-called annual assessment work on the claims.

After the administrative decisions in the contests and after two unanimous decisions by this Court on the precise question involved had held that the Department had neither procedural power nor substantive authority to invalidate oil shale claims for failure to perform annual assessment work,[3] the Department in 1935 issued a ruling and various implementing directives which had the consequence of depriving of effect the decisions rendered in these contests and other similar administrative proceedings. Following its action in 1935 the Department thereafter consistently applied the administrative policy that the assessment work contest decisions of the kind rendered against the claims in controversy were themselves nullities.

In April 1964, however, in an administrative *volte face,* the Department announced in its decision in *Union Oil Company of California,* 71 I. D. 169, involving different oil shale claims, that the earlier assessment work decisions had become effective adjudications of invalidity of oil shale claims. As a consequence, the respondents promptly commenced this action in the District Court for direct judicial review of and relief from the 1928-1931 decisions, which it was only then for the first time necessary to obtain. No application for a patent has been filed for any of these claims, and the requested relief in this action does not include a prayer that the Secretary be required to issue patent. The relief sought in the complaint (App. 14-15), and granted by the District Court (App. 48-51), was con-

3. *Wilbur* v. *Krushnic,* 280 U. S. 306; *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U. S. 639.

fined to a prayer that the former decisions be expunged and that the Secretary be enjoined from asserting their validity.

The Oil Shale Corporation, which was incorporated in 1955, acquired in 1963 and presently holds a mining lease to the claims in suit and an option to purchase them.[4] In the first decade of its existence the Corporation spent several millions of dollars in the contruction of oil shale mines, retorts and related facilities and in the pursuit of research and development, in pursuance of a plan for the commercial production of shale oil.[5] These efforts have resulted, among other things, in the development of a method for the retorting of oil shale which, as the Department's most recent publication on oil shale explicitly concedes, has been "developed to the point of possible commercial application"[6] and in extensive testing of mining technology.[7] In 1968 the Corporation bid for an oil shale lease offered by the Department, which contemplated operations on a scale which would have provided an annual royalty to the Government of $5.25 million. This bid was rejected.

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4. Except as to the Bute claims Nos. 30-48. The Oil Shale Corporation purchased those claims in July 1964 by exercise of an option to do so itself acquired in June 1963.

5. See the testimony of Morton M. Winston, Vice President of The Oil Shale Corporation, "Competitive Aspects of Oil Shale Development", Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, Part 1 (April and May 1967), pp. 308-346.

6. "Prospects for Oil Shale Development", Dept. Int. (Govt. Print. Off., 1968), pp. 45-47. The "conventional" or surface oil shale process consists of the successive steps of *mining* the shale, *crushing* the mined rock to the appropriate size, *retorting* the crushed shale in a closed vessel at high temperatures to produce crude shale oil, and *refining* the crude shale oil into finished products.

7. "Mining technology has been tested extensively by both the Bureau of Mines and Tosco, for outcrop deposits of from 50 to 70 feet of oil shale beneath several hundred feet of overburden." *Id.*, p. 62.

The Legislative Setting of the Assessment Work Controversy

The legislative history of any mining claim question begins long before there was any federal mining legislation. In 1848 gold was discovered on Federal land in the California Territory; on December 5 of that year President Polk proclaimed to Congress "The accounts of the abundance of gold in that territory are of such an extraordinary character as would scarcely command belief . . . ."[8]; the great Gold Rush of 1849 resulted. The Forty-Niners were actually trespassers, for virtually all western lands were Federal lands yet there was no Federal mining legislation. The mineral prospectors remained trespassers until 1865, when the first Federal mining legislation applicable generally to the public domain was enacted.

The trespassing prospectors and miners evolved by practice and enforced by vigilante measures customs that became the essential content of Federal legislation, that the Congress ratified and adopted.[9] Since none of these adventurers then had or could obtain legal title to any

8. Swenson, "Legal Aspects of Mineral Resources Exploitation", Chapter XXIII (pp. 699-764) of HISTORY OF PUBLIC LAND LAW DEVELOPMENT (written for the Public Land Law Review Commission) 708 (Govt. Print. Off. 1968) hereinafter cited for brevity as "Swenson".

9. The miners "were emphatically the law-makers, as respects mining, upon the public lands" (*Jennison* v. *Kirk*, 98 U. S. 453, 457), and the Federal mining statutes gave to the regulatory pattern the miners had developed the "sanction of Law" (*Jackson* v. *Roby*, 109 U. S. 440, 441-442). As this Court explained in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 650:

> "The rules and regulations originally established in California have in their general features been adopted throughout all the mining regions of the United States. They were so wisely framed and were so just and fair in their operation that they have not to any great extent been interfered with by legislation, either state or national."

public domain land, they had to develop standards to create and protect rights to the possession and enjoyment of any given tract of land; indeed, their customs came to be known as the Law of Possession. The creation of rights of possession was based upon priority of appropriation; the rights of the first to discover minerals and stake a claim were those to be protected.

The miners also found it expedient to formulate objective standards for determining the circumstances under which a prior appropriator could be dispossessed by a later one, and those customary standards became curiously specific.[10] In general, these standards provided that the later appropriator could obtain possession and enjoyment if the prior appropriator failed to perform a specified amount of work on his claim within a specified period.[11]

Early during the trespass period the miners' regulations came to be sanctioned by local legislation and enforced in local tribunals. See, *e.g.*, *Erhardt* v. *Boaro*, 113 U. S. 527, 535. Appeals in such cases apparently could not then be carried to this Court, in view of the ruling in *Lownsdale* v. *Parrish*, 21 How. 290, that ownership of land by the United States undermined any jurisdictional basis for this

10. The miners' customs included "provisions relating to . . . the amount of work required to hold the land from others who were only too eager to cry 'abandonment'. . . ." Swenson, at p. 709. Mark Twain writes of a bonanza he, a friend Higbie, and another located but lost, each thinking the others would do the work within the locally applicable ten days period, "At midnight of this woeful tenth day, the ledge would be 'relocatable', and by eleven o'clock the hill was black with men prepared to do the relocating. That was the crowd I had seen when I fancied a new 'strike' had been made—idiot that I was. . . . As midnight was announced, fourteen men, duly armed and ready to back their proceedings, put up their 'notice' and proclaimed their ownership. . . ." *Roughing It*, Chapter XLI, at p. 219 (Signet Classic Ed., New York, 1962). Twain dedicated *Roughing It* "To Calvin H. Higbie . . . In Memory of the Curious Time When We Two Were Millionaires for Ten Days." *Id.* at v.

11. See, *e.g.*, Swenson, at p. 713.

Court to adjudicate a dispute over possession between two private parties.[12]

The first legislation Congress passed on mining matters had as its purpose making the Federal courts available to adjudicate such disputes in accordance with the Law of Possession. See, *e.g.*, *Swenson*, at p. 717. This 1865 act, 13 Stat. 440, provided that no possessory action in any Federal court for the recovery of any mining "title" would be affected by the fact that the land was owned by the United States, and mandated that "each case shall be adjudged upon the law of Possession." The initial Congressional mandate thus simply adopted the customary Law of Possession. There still were no provisions for obtaining legal title; Congress neither authorized nor required anything whatsoever of the Executive Branch and its administrative departments. Thus questions such as default in performance of assessment work did not concern the United States, and could not properly arise in the Interior Department, but were clearly matters between adverse private claimants to be adjudicated in the courts.

In the years 1866-1872 Congress enacted three related mining statutes which govern the case at hand and which as noted above ratified the miners' customary law and in essence codified it for the future.[13] Congress adopted the prevailing assessment work standard, *i.e.*, one hundred dollars worth of work per year, and allowed for relocation

12. Even after Federal legislation was enacted to authorize creation of private rights in public domain mineral lands, this Court was of the view that most disputes between private parties did not present Federal questions calling for exercise of this Court's appellate jurisdiction. See, *e.g.*, *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505.

13. The Mining Act of 1866, 14 Stat. 251; The Placer Act of 1870, 16 Stat. 217; The Mining Law of May 10, 1872, 17 Stat. 91, 30 U.S.C. 21 *et seq.*; see generally Swenson, at pp. 716-723.

by a subsequent appropriator if there had been a default in performance of the work and such work had not been resumed.[14]

Congress also provided a less drastic sanction than relocation to encourage performance of assessment work by regulating priorities among different claimants depending upon whether they did the work. Congress provided that where a claim was owned by more than one person and work was performed by some but not all of the co-owners, those who did the work became entitled to ownership of the entire claim. 30 U.S.C. 28; see *Elder* v. *Horseshoe Mining & Milling Co.*, 194 U. S. 248, 256; *Van Sice* v. *Ibex Mining Co.*, 173 Fed. 895 (8th Cir. 1909). Significantly, Congress did not provide that failure of one co-owner to do the work would automatically forfeit his interest. His interest would continue unless the co-owners who had done the work demanded, by appropriate formalities, that he contribute his share of the expenses of the work, and he thereupon failed to make such contribution within the period specified by Congress. 30 U.S.C. 28.

Congress in 1866-1872 also authorized the passage of legal title to mineral lands, upon application to the appropriate local land office.[15] It is significant, however, that in providing for the passage of legal title, Congress did not call upon the Interior Department to regulate or control the private appropriation of mineral lands.[16] This was in marked contrast, for example, to the private appropria-

14. Act of May 10, 1872, sec. 5, c. 152, 17 Stat. 92, as amended, 30 U.S.C. 28.

15. Act of May 10, 1872, sec. 6, c. 152, 17 Stat. 92, as amended, 30 U.S.C. 29.

16. See, *e.g.*, *David W. Harper*, 74 I.D. 141, 150 (1967) ("The ordinary application to enter land under the various public land laws, or to lease land under the mineral leasing laws of the United States, imposes upon this Department the responsibility for determining whether the land can or should be disposed of pursuant to the par-

tion of agricultural lands, upon which the citizen could usually enter only after the Department had surveyed the lands and only after the Department had specifically authorized the citizen to enter the lands, and in which the citizen could obtain vested rights only after a minimum of five years of utilization of the land under the close supervision and regulation of the Department.[17]

In contrast, Congress provided that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase," 30 U.S.C. 22—in effect, that the first to discover and claim valuable minerals could have

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ticular law under which application is filed, whether the applicant is qualified under that law to have his application approved, and, if the land is suitable and the applicant is qualified, whether one applicant is to be preferred over another equally qualified applicant in the event of competing applications. It is only after the Department has made these determinations that any rights in the land vest in an applicant. *This is not true of the location of a mining claim.* The locator of a mining claim does not file an application to locate a claim, and the acts required for the location of a claim do not include even notice to this Department. The location of a valid mining claim is, in effect, a grant from the United States, and, by the location of a valid claim, the locator is vested with a present right of possession without action on the part of this Deparment"). (Emphasis added.) See also *The Clipper Min. Co.* v. *The Eli Min. & Land Co.*, 34 L.D. 401, 410 (1906) (". . . a mining location is not of record before or connected with the land department, and is not so connected or usually within the latter's knowledge until application for patent is filed or it is properly called in question by another . . .").

17. See, *e.g.*, Act of May 20, 1862, 12 Stat. 392; 43 U.S.C. 161-235. One who is proceeding to homestead has, prior to patent, "protection against intrusion by other settlers, but as against the Government his right is only conditional and inchoate." *Oscar O. Reeg*, 40 L.D. 206 (1911). At any time prior to patent the homesteader could be ousted, either by a Governmental withdrawal of the land from entry and settlement, see *Russian-American Co.* v. *United States*, 199 U. S. 570, or by a mining claimant who discovered valuable minerals within the homestead, or by any other development which indicated the presence of mineral values. See, *e.g.*, *Leonard* v. *Lennox*, 181 Fed. 760 (8th Cir. 1910).

them and would be protected in possession and enjoyment thereof. The citizen need not first resort to the Land Office and indeed need never resort there; the availability of a patent, upon application therefor, was an optional convenience for the citizen.[18]

This limited role for Interior stands in marked contrast to the more recent Congressional grants of broad authority to administrative agencies in terms of "public convenience and necessity" and the like, as well as in contrast to other grants of authority Interior itself, in areas such as homesteads and mineral leasing.[19] As the Secretary of the Interior stated in his annual report for 1930 at the height of the campaign to invalidate oil shale claims, ". . . oil shale claims valid in 1920 can be taken to patent under the mining law, without any discretionary power in this department to decline to issue the patent" (Pl. Ex. 15; A. 70).[20]

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18. "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property' subject to the lien of a judgment recovered against the owner in a state or territorial court. *Belk* v. *Meagher*, 104 U. S. 279, 283; *Manuel* v. *Wulff*, 152 U. S. 505, 510-511; *Elder* v. *Wood*, 208 U. S. 226, 232; *Bradford* v. *Morrison*, 212 U. S. 389. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent." *Wilbur* v. *Krushnic*, 280 U. S. 306, 316-317.

19. See, *e.g.*, *United States ex rel. McLennan* v. *Wilbur*, 283 U. S. 414.

20. Plaintiffs' Exhibits 1-307, inclusive, were all received in evidence together at R. 863, subject to objection to individual exhibits. Those relatively few objections were uniformly overruled, R. 918-934. Accordingly, to avoid repetition in citation, record references to any of these exhibits will omit the page at which they were admitted.

Congress intended that the annual assessment work requirement be effective only to regulate priorities as between rival locators, as it had always done, and not to impose any assessment work requirements insofar as obtaining valid rights from the United States was concerned.[21] Indeed, Congress did specify a separate objective standard to govern the rights of the United States in regard to the work done by a mining claimant; to require the United States to transfer title by a patent, the claim owner must expend five hundred dollars worth of labor or improvements upon his claim.[22] Moreover, Congress specified that if in the course of the Land Office's processing of a patent application there did arise a question under the Law of Possession, such as an assessment work dispute between rival claimants, the Land Office was not to decide that dispute. 30 U.S.C. 29, 30. Rather, the patent application proceedings "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction...." 30 U.S.C. 30. After a court had decided the dispute, the judgment roll was to be certified to the Land Office "and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." 30 U.S.C. 30. The purpose of this statute, this Court said in *Iron Silver Min. Co.* v. *Campbell*, 135 U. S. 286, 299, seems to be

> that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner

21. This is clearly implied by the right of the claim owner who ceases assessment work to protect against relocation by resuming assessment work.

22. 30 U.S.C. 29. There is no time limitation or requirement; the $500 may be expended in one week, or over 40 years.

> prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these claimants shall have the patent, the final evidence of title, from the government. . . .

In effect, then, the Federal legislation of 1866-1872 left questions arising under the Law of Possession where the 1865 Act had, in the courts, and left assessment work as a matter regulating only priorities between rival claimants.

The Department of the Interior long recognized, prior to 1920, by regulation and decision, that it had no jurisdiction over questions such as assessment work which arose only under the Law of Possession and that exclusive jurisdiction over them was in the courts. *E.g., Branagan* v. *Dulaney,* 2 L.D. 744, 749-50 (1884); *Alice Placer Mine,* 4 L.D. 314 (1886); *Aurora Lode* v. *Bulger Hill and Nuggett Gulch Placer,* 23 L.D. 95 (1896). Some questions, such as discovery, could arise either under the Law of Possession or during an Interior determination as to the validity, as against the United States, of a mining claim, and in the latter case Interior did have jurisdiction to proceed. Congress had made the discovery of mineral a condition precedent to the grant effected by the mining law, and hence discovery was a matter that did concern the government. But assessment work (unlike discovery and the $500 patent work requirement) did not concern the United States, and thus could arise only under the Law of Possession. Interior's basic mining regulations recognized this: "The annual expenditure of $100 in labor or improvements on a mining claim . . . is . . . solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession,

the determination of which is committed exclusively to the courts."[23] *Accord, P. Wolenberg,* 29 L.D. 302, 303-304 (1899) (vacating an order by the Commissioner of the General Land Office to inquire into the performance of assessment work, noting "the order involves matters which the land department can not inquire into . . . [and] clearly relates to matters over which the land department is without authority . . . and goes only to the right of possession, the determination of which is committed to the courts and not to the land department"[24]); *Nielson* v. *Champagne Mining & Milling Co.,* 29 L.D. 491 (1900).[25]

23. This regulation had long been in effect by the time the Congress began consideration of the Mineral Leasing Act of 1920 and remained in effect throughout that period and thereafter until the present time. See, *e.g., Regulations,* 37 L.D. 757, 769 (1909); *Regulations,* 49 L.D. 58, 73 (1922); 43 C.F.R. 3420.4 (1969).

24. The Secretary continued that assessment work "is essentially different from" the patent work requirement, "which makes the expenditure of five hundred dollars, in labor or improvements a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the land department." 29 L.D. at 304.

25. Although Interior was to contend that the passage of the Mineral Leasing Act of 1920 for the first time gave it jurisdiction with respect to assessment work on pre-1920 claims for lands containing leasable minerals, it continued to acknowledge that with respect to non-leasable minerals, *e.g.,* gold, silver, copper, zinc, lead, it had no jurisdiction over assessment work. *E.g., Proceedings Against Mining Claims Within the Area of the Boulder Dam Project, Instructions,* 53 I.D. 228 (1930); *Challenges to Validity of Mining Claims in National Parks,* 53 I.D. 491 (1931). The areas covered by these general pronouncements had certainly been "withdrawn"; the contrary implication in the Government's brief, p. 56 n. 22, is at best mistaken. Shortly prior to the Mineral Leasing Act of 1920 Interior acknowledged that it had no concern with assessment work on oil shale claims (Pl. Ex. 51; A. 99-100; Pl. Ex. 52; A. 100) and it returned to this position in 1935 after this Court's decision in *Ickes* v. *Virginia Colorado Development Corp.,* 295 U. S. 639. *E.g.,* Pl. Ex. 55; A. 102 ("this office has no jurisdiction over questions relating to the performance of annual assessment work on mining claims, such questions being committed exclusively to the courts.").

The 1866-1872 Federal mining legislation remained in effect throughout the period in which the mining claims in suit were initiated. In 1896 the Land Office did temporarily question whether the mining legislation applied to petroleum, as the Land Office had often ruled that it had, but on reconsideration the Land Office adhered to its prior rulings. At the same time, Congress confirmed that the mining legislation did and should apply to petroleum.[26]

The Mineral Leasing Act of 1920 amended the mining laws by substituting leasing for new mining claims for a few specified minerals, including oil shale. As to previously initiated mining claims, the Act made no change; on the contrary it specifically provided that they should continue to be governed by "the laws under which initiated." Act of February 25, 1920, 41 Stat. 451, 30 U.S.C. 193. These laws had made assessment work solely a test for adjusting priorities among rival private claimants, and included a prior claimant's right to foreclose a subsequent claim by resuming his work.[27] That those and all other incidents of ownership of pre-Leasing Act claims were to continue appears both from the clear language of the excepting clause of the Act and from the explanation of the leasing bill on the floor of the House given by Representative Taylor of Colorado, one of the conferees and a

26. See *Union Oil Co.*, 23 L.D. 222 (1896), *On Review*, 25 L.D. 351 (1897); 29 Stat. 526 (1897).

27. While prior to the Multiple Mineral Development Act of 1954, 30 U.S.C. 521-531, the Mineral Leasing Act arguably precluded subsequent relocations of excepted valid claims (the question was never decided), the alternative sanction the mining statutes provided to encourage performance of assessment work, transfer of ownership from a co-owner who did not do work to others who did, always remained fully effective. After the 1954 legislation, oil shale claims were open to relocation for non-leasing act minerals and the post-1954 assessment work done on the claims in suit, which the Government's brief disparages (pp. 19-21), had in fact the function of protecting the claims.

manager of the bill on behalf of the House: he made clear that owners of existing mining claims were by the excepting clause "entitled to go ahead and maintain and perfect their claims under the present existing laws and obtain a patent to their lands just as though this bill had never been passed." 59 Cong. Rec. 2711-12 (Feb. 10, 1920).

The 1920 Act's continuation, unaltered, of the mining laws for previously initiated claims stands in marked contrast to previous legislation in which Congress had clearly expressed a decision to make assessment work a matter of concern to the United States. When this was what Congress intended, it said clearly and simply that a default in performance of assessment work would "forfeit" the claim.[28]

The limited scope of the authority that the Federal legislative scheme conferred upon Interior with respect to mining claims appears from the fact that as late as 1913 Interior was of the view that it could not inquire into the validity of any mining claim unless it had before it an application to take the claim to patent.[29] This question was not settled until 1920 in *Cameron* v. *United States*, 252 U. S. 450, where this Court rejected the argument that all that Interior had power to do was to reject a patent application. Significantly in terms of the Government's brief

28. The Act of March 2, 1907, 34 Stat. 1243, *"An Act to amend the laws governing labor or improvements upon mining claims in Alaska"* states: "And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited. . . ." The Act of January 11, 1915, 38 Stat. 792, validating certain phosphate claims, applied only to claims "upon which assessment work has been annually performed."

29. *Nichols and Smith* (Interior, October 24, 1913). Prior to *Nichols and Smith* Interior had briefly taken the contrary position. See *Cameron* v. *United States*, 252 U. S. 450, 453, 463. The provisions of the mining statutes for processing patent applications are the only statutes which mention the Land Office in the context of mining claims.

here, although *Cameron* involved withdrawn land for which the United States had "competing specific uses," the Court there did not regard that as affecting Interior's authority. Rather, it ruled that the Land Office had "jurisdiction" to determine whether equitable title had passed, and that this "power" of the department continued until legal title passed, although the mineral land law did not itself confer such "authority" on the land department.[30]

Oil shale mining claims validly initiated prior to the Mineral Leasing Act represent property interests that arose under the 1866-1872 mining statutes and were in fact approved by the Executive Branch, for although from about 1907 on the Executive Branch generally did withdraw from private appropriation under the mineral laws lands clearly known to be valuable for minerals,[31] it refrained from doing as to the oil shale deposits of the Green River Formation in Colorado, Utah and Wyoming. Field reconnaissance during 1913-1915 confirmed the presence of these deposits. Their value and national importance appeared from their magnitude and richness, the history of flourishing oil shale industries in Scotland and elsewhere based on deposits inferior to those of the Green River Formation, the expanding demand for liquid hydrocarbons, and the dwindling reserves of conventional oil and gas. In view of this information, in the spring of 1916 Interior formally classified Green River Formation lands as valuable for their mineral deposits,

30. *Cameron* v. *United States*, 252 U. S. 450, 461. The Court's equating of "power", "jurisdiction", and "authority" is significant in view of the dispute here as to the meaning of this Court's statement in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, 647, that the assessment work contests and decisions "went beyond the authority conferred by law."

31. See generally, Swenson, at pp. 726-736.

thereby precluding their appropriation under the non-mineral land laws.[32]

Significantly, however, at the same time Interior considered and rejected the possibility of withdrawing the lands from private appropriation under the mining laws as well. It did so knowing that large research and development expenditures and many years of work would be needed to bring about the technological capacity the nation required to utilize the oil shale deposits, and expecting that the availability of oil shale lands under the mining laws would induce private parties to bring about the desired technological capability.[33]

Although some oil shale mining claims had been initiated prior to Interior's decision in the spring of 1916 to leave Green River Formation lands open to private appropriation[34], the great majority of them, including all of the claims now before this Court, were initiated thereafter. There can be no doubt that the availability of such lands has been an indispensable factor in inducing large private expenditures (and related Governmental expenditures urged by private parties) on oil shale research and development, including expenditures by the owners of the claims now before this Court. The result of these expenditures is

32. See, *e.g.*, Deft. Ex. N; R. 7584-7862, 896. See generally, Winchester, *Oil Shale in Northwestern Colorado and Adjacent Areas*, United States Geological Survey Bulletin No. 641-F, in *Contributions to Economic Geology*, 1916, Part II (Gov't Print. Off. 1916), pp. 139-142; Gavin, *Oil-Shale, An Historical, Technical, and Economic Study*, United States Bureau of Mines Bulletin 210 (Govt. Print. Off. 1922), pp. 3-18, 55-59, 111, 137.

33. "The lands have not been recommended for withdrawal because the oil-shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral-land laws . . ." Pl. Ex. 220; R. 2114-15.

34. See, *e.g.*, Pl. Ex. 231; R. 2178-98.

that there are now available at least three different technological processes by which the oil shale deposits of the Green River Formation can be utilized.[35]

The value to the Government of these technologies appears not only from its general interests in the strength of the domestic economy, but also from its proprietary interests.[36] The Government today owns free and clear of any private oil shale claims most of the nation's oil shale deposits. This is exceptional in view of the general purposes and consequences of the public land laws, both mineral and non-mineral. These laws, broadly speaking, had as their object the development of the western two-thirds of the country by the grant of rights to land to those willing to develop it. Under those laws, hundreds of millions of acres of public land have passed, and are still passing, to private ownership. The colossal scale of this transfer appears from the fact that while the Federal Government has at one time or another owned "three-fourths" of all of the United States—almost two billion acres of public land and resources,"[37] it now owns, exclusive of 200 million acres in national parks and forests, only 465 million acres.[38]

35. Department of the Interior, *Prospects for Oil Shale Development*, pp. 45-48 (1968).

36. The magnitude of these interests is suggested by a bid the respondent The Oil Shale Corporation made in December 1968 to lease 5,120 acres of Federal oil shale land in Colorado (offered for lease at 33 Fed. Reg. 16154, Nov. 5, 1968). The projected operations contemplated mining and processing of oil shale yielding an average of 40 gallons of oil per ton, for which the royalty would have been $.24 per ton. 33 Fed. Reg. at 16156. At the projected mining rates, 66,000 tons per day for 330 days per year, the annual royalty would have been $5,250,000. The project life was 20 years.

37. "Program for the Public Lands and Resources," U. S. Dept. of the Int., May 1962 (U. S. Govt. Print. Off., 1963), p. 9.

38. Information Bulletin No. 1, Bureau of Land Management, U. S. Dept. of the Int. (U. S. Govt. Print. Off. 1965).

This transfer to private ownership of two-thirds of what has been public domain has not, however, been reflected in oil shale, and the present pattern of ownership of oil shale land is not typical of that process of transfer. The Federal Government still owns the great bulk of the principal oil shale deposits, those of the Green River Formation.[39] It owns approximately 82% of the estimated shale oil in place in Colorado.[40] The balance is divided between oil shale lands patented to private individuals over the 40 years from 1920 to 1960 and oil shale lands embraced within unpatented mining claims, including the claims in this litigation.

The Development and Course of the Oil Shale Assessment Work Controversy

The widespread interest in the oil shale of western Colorado which developed in the decade immediately preceding passage of the Mineral Leasing Act of 1920 and an appreciation of the value of these deposits led Congress to include oil shale as one of the minerals withdrawn from claim location by that Act. Interior was well aware of the location of numerous oil shale claims prior to passage of the Act,[41] and section 37 of the Act shows

39. The oil shale deposits of the Green River Formation in Colorado, Utah and Wyoming have been described as "the largest known concentration of hydrocarbons in the world". See, for example, the "Interim Report of the Oil Shale Advisory Board to the Secretary of the Interior, February 1, 1965" reprinted in "Federal Oil Shale Program", Hearings before the Senate Committee on Interior and Insular Affairs, 90th Cong., 1st Sess., p. 278 (1967).

40. *Id.* at 279. The same report (*Id.* at 278) is authority for the fact that 75% of the known deposits of oil shale of the Green River Formation lies in the so-called Piceance Creek Basin of Colorado.

41. This is shown, for example, by the 1918 investigations conducted by Interior at the request of the Attorney General of the Oyler claims involved in *Brown* and other oil shale claims located prior to

Congressional awareness of that activity.[42] It was also the announcement of a policy that valid claims were to be unaffected by the passage of the Act but were to be left to the regime established by the Mining Laws. These laws of course imposed conditions upon the validity of mining claims; when the first oil shale patent application reached the Department shortly after passage of the Mineral Leasing Act, the Commissioner of the General Land Office argued for its rejection on broad grounds which would have precluded recognition of the validity of any oil shale claims (Pl. Ex. 1; A. 62). That suggestion was decisively rejected in the Secretary's published *Instructions* of May 10, 1920, 47 L.D. 548 (Pl. Ex. 60; A. 105-110). The *Instructions* noted that "oil shale has been long recognized as a valuable mineral deposit" (47 L.D. at 549), that the Geological Survey had reported in 1916 that "in view of the high prospective mineral value of lands underlain by oil shale deposits . . . they should not be permitted to be acquired under the non-mineral land laws" (*id.* at 550-51), that the lands had been classified as valuable for minerals, and that Congress, in recognition of its value, had included oil shale in the Leasing Act.[43]

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the establishment of the Naval Oil Shale Reserve but within its outer perimeter (Pl. Ex 225-232; R. 2133-2202; see App. 243-249).

42. Deposits of oil shale "in lands valuable" therefor were thenceforth to be disposed of only pursuant to the Act "except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Act of February 25, 1920, c. 85, §37, 41 Stat. 451, 30 U.S.C. 193 (1964).

43. The Secretary said of the 1920 Instructions that they were "prepared after careful study of the mining laws and decisions by the legal force of this Department, and in the unanimous opinion of that force was the only conclusion that could be reached under the law and the facts" (Pl. Ex. 62; A. 110).

The 1920 *Instructions* did not, of course, preclude a showing as to the invalidity of individual claims, and as patent applications were filed in the local land offices Interior made such determinations as to the claims involved. In the latter 1920's Interior embarked upon a "field investigation . . . of all oil shale claims" (Pl. Ex. 2; A. 64), whether or not patent applications had been filed, in the evident hope that "by proceeding now against such locations evidence may be gathered which might not be available in the future should applications for patent be filed" (Pl. Ex. 3; A. 65). Interior had by then taken the position that continuous performance of assessment work was an aspect of the validity of oil shale claims, and the investigations ranged into that question as well as all actual aspects of the validity of the claims, "and charges [were] preferred against such locations as were reported to be invalid for any cause, such as, lack of discovery, dummy locators and failure to perform annual assessment work, and where [patent] applications have been filed failure to perform the required patent expenditures" (Pl. Ex. 5; A. 67). Where the evidence was thought adequate to sustain a charge other than failure to perform assessment work, Interior would declare the claim invalid on the additional ground.[44] See *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37 (D.C. Cir. 1963), *cert. denied*, 375 U. S. 822, for an example of a decision on the ground of abandonment.

The "assessment work controversy" thus was only a part of a commendable effort to determine the validity

44. The statement in the Government's brief that the Secretary "began a practice of limiting the investigations and charges to the assessment work issue" (p. 13) is unsupported. In particular the Government cites no evidence, and there is none in the record, that the field investigators were ever instructed to consider only the assessment work question.

of all oil shale claims when that could best be done. It became a major controversy, however, for two basic reasons. First, Interior's legal position on assessment work represented an abrupt departure from long settled law and thus presented a bitterly disputable question of law, one of subject matter jurisdiction at that, common to all oil shale claims.[45] Second, it generally appeared to Interior's field investigators that sufficient assessment work was not being performed. This appeared for several reasons, probably chief among which was the financial inability of the claim owners to expend $100 a year on each claim. Rural communities experienced a depression as early as 1921, and by the end of 1929 the entire economy had been brought down. Another major reason, however, undoubtedly was that Interior took the view that work qualified as assessment work only if it effected, or physically facilitated, the actual extraction of oil shale deposits from the particular claim. See, *e.g.*, *Emil L. Krushnic*, 52 L.D. 282, 292-294 (1927). The kind of work needed to bring about commercial production from oil shale was laboratory and pilot-plant research and development work on the processing of oil shale which had already been mined,[46] and Interior refused to recognize such work as assessment work. Thus it was that the hundreds of thousands of dollars that the Index Oil Shale Company, in which the family of respondent Penelope Chase Brown figured prominently, spent during the 1920's on its research and development operations had no influ-

45. On the other hand, in cases where charges such as abandonment or lack of discovery were raised, although there might be a sharp factual issue to be resolved at hearings, there was then and is now no question of Interior's right to challenge claims on such grounds.

46. This point was, for example, explicitly recognized in Congressional consideration of the inclusion of oil shale in the Mineral Leasing Act. See pp. 16-17, *supra*.

ence on Interior's decision in 1929 to contest the four Oyler claims for insufficient (i.e., less than $400 per year) assessment work. In brief, Interior would not recognize useful work, and there was little point in doing work it would recognize—even had the money been available.

This distinction between assessment work charges and other grounds for challenge appeared in the contest proceedings begun in 1923 against the Spad No. 3 oil shale claim in what became the first test case on the assessment work issue. The charges included fraudulent location and lack of discovery as well as a charge that for one year "neither the applicant nor his predecessors in interest performed any assessment work to the value of at least $100, tending to develop the claim." The other charges were dismissed after a hearing, and the assessment work charge was thus the sole ground upon which the Commissioner of the General Land Office adjudged the claim invalid. Upon appeal, the Secretary affirmed the Commissioner (*Emil L. Krushnic*, 52 L.D. 282 (1927)), over the claimant's arguments against "the insufficiency of [the assessment work] charge as a valid charge," arguments which were that

> . . . the Government is not by the leasing act (act of February 25, 1920) invested with the character of an adverse claimant; that no annual assessment work has been required to maintain claims theretofore initiated and existent at the date of the passage of said act; that the claim does not become *ipso facto* void upon default in the performance of assessment work, but it would be necessary, to effect such a forfeiture, to assert and establish the same in an independent tribunal. (*Id.* at 285)

The decision upon rehearing, 52 L.D. 295 (1928), adhering to the original decision, emphasized the nature of the

case as a test of the jurisdictional issue and noted the appearance in the case on reargument of other oil shale claimants as *amici curiae*.[47]

It was in the course of this campaign of investigation and challenge of oil shale claims that the three contests were brought against the claims in suit: Contest 11757 against the Bute claims, Contest 11759 against the Atlas claims, and Contest 11761 against the Camp Bird claims. They were commenced at the direction of the Commissioner of the General Land Office in December 1927 on the single charge of a failure to perform annual assessment work (Pl. Ex. 9, 11 and 13; R. 1554-55, 1558-59, and 1562-63), and were thus unlike the *Krushnic* contest, where the field investigation indicated that other charges, as well, should be raised. As in the *Krushnic* contest, however, the assessment work charge alone was the basis for decisions by the Commissioner on May 4, 1928, declaring the Bute, Camp Bird and Atlas claims null and void (Pl. Ex. 10, 12 and 14; R. 1556-57, 1560-61, and 1564-65).

In 1930, however, this Court held that the Secretary's decision in the *Krushnic* case on the same assessment work charge was "contrary to [the] explicit terms" of the Leasing Act. *Wilbur* v. *Krushnic,* 280 U. S. 306, 319. The rationale of the decision was that prior to passage of the Mineral Leasing Act "annual performance of labor was not necessary to preserve the possessory right . . . as against the United States, but only as against subsequent relocators," that, indeed, upon performance of $500 worth of work in the aggregate on a claim the claimant might obtain patent "even though in some years annual assessment labor had been omitted,"

47. The suggestion in the Government brief (pp. 13-14) that Krushnic was the single oil shale claimant interested in the assessment work issue is thus quite wrong.

and that the owner of a mining claim "equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened," for resumption of work was "not in derogation but in affirmance of the original location" and "preserves an existing estate." The Court concluded that "the Secretary's decision to the contrary violates the plain words of the excepting clause of the Leasing Act." (*Id.* at 317-18; italics omitted).

Interior's reaction to the Supreme Court's *Krushnic* decision was to resume the campaign on the assessment work charge after altering slightly the form of its proceedings "in order to test out the extent of the authority (if any) left to us by the Supreme Court decision . . ." (Pl. Ex. 47; A. 96).[48] The change in procedure involved an elaboration of the contest complaint to charge not only that assessment work had not been performed, but also that it had not been resumed, and a posting of the land embraced within the claims to show a physical challenge to their validity by the United States. The altered procedures reflected the Secretary's view as expressed in his annual report for 1930 that the *Krushnic* decision "although it reversed the department and sustained the claimants on the issue of assessment work . . . left the possibility (though no certainty) that if the remaining claims were posted before resumption of work on the claim, a different result would follow. This posting work will continue during the current year, and the tremendous task of adjudicating these claims will get under way. A second test case in the courts may be expected" (Pl. Ex. 15; A. 70).

48. Testimony of Secretary Wilbur before the Senate Committee on Public Lands, February 12, 1931.

The resumption of the campaign along the altered lines reflected of course the Secretary's view that decisions declaring oil shale claims null and void on the pre-*Krushnic* assessment work allegation were wholly ineffective. Secretary Wilbur thus acted to give effect to this Court's decision in *Krushnic,* just as his successor, Secretary Ickes, was to give effect, as administrative policy, to this Court's later decision in the *Virginia-Colorado* case. This is shown by instructions to the field force shortly after the *Krushnic* decision to "submit . . . reports in all cases" where there was no evidence of resumption of work (Pl. Ex. 16; A. 70-71), so that new challenges might be asserted. It was shown also in the Secretary's statement, following the *Krushnic* decision, as to the very claims in suit here, that "the action declaring . . . claims null and void on the charge as made, is not tenable . . . . It will, therefore, be necessary not only to post the claims that are still undisposed of, but also those which have been heretofore declared null and void" (Pl. Ex. 25; A. 80). The Secretary therefore approved new proceedings against the claims.[49] The Commissioner of the General Land Office, in turn, instructed the Chief of the Field Division to treat the claims the same as others then in the course of being investigated, inasmuch as "charges of failure to do assessment work" upon which the prior administrative decisions rested "were of no effect, in view of the decision of the Supreme Court of the United States in said *Krushnic* case, and all oil shale claims, which were proceeded against and declared null and void on that

49. Despite this clear administrative vacation of the 1928 decisions against the claims in suit, the Government's Brief (p. 5) would have this Court revive them, if indeed they ever lived. Of course, if they possessed vitality, Interior would not have brought nor would the Government now have to rely upon the post-*Krushnic* assessment work proceedings against the claims in suit.

charge alone . . . will have to be proceeded against anew" (Pl. Ex. 26; A. 81). In response to advice from the field that assessment work had not been performed for the year ended July 1, 1929, and had not since been resumed (Pl. Ex. 27; R. 1600), the Commissioner, by letters of June 30, 1930, addressed to the Register of the Denver Land Office, directed that adverse proceedings be renewed (Pl. Ex. 29; R. 1601).

In respect to Contest 11757 against the Bute claims the letter of June 30, 1930 (Pl. Ex. 30; R. 1602-03)[50], recited the facts of the prior proceedings and directed new proceedings against the claims on the ground "that annual assessment work to the value of $100" was not performed for the year ending July 1, 1929 "and that work has not been since resumed."[51] In a decision of July 3, 1931 (Pl. Ex. 31; A. 82) the Commissioner, referring to a report of service of notice of the charge on eight of the ten parties named, stated that "The failures of the parties served with notice to file answers denying the charge are taken as admissions by them of the truth thereof" and declared the Bute claims 1-48 null and void to the extent of the interest of the parties served. In a subsequent letter of November 9, 1931, the Commissioner, reciting a report of service on the remaining parties named and their failure to answer, declared the remaining interests in the claims null and void (Pl. Ex. 32; A. 83).

50. The letter of June 30, 1930, inadvertently directed proceedings against only Bute claims Nos. 1-18; a subsequent letter of July 22, 1930, corrected the error and directed that all 48 claims be proceeded against (Pl. Ex. 30; R. 1604-05).

51. The charge upon which the claims were attacked, that for a single year assessment work of at least $100 had not been performed (not, it should be noted, that *no* assessment work was performed), is a far cry from an allegation that the claims were abandoned. The suggestion in the Government's brief that assessment work decisions served to clear the land of abandoned claims (p. 42) is contrary to the facts.

The renewed proceedings in Contests 11759 and 11761 were directed on a charge phrased in substance identically with that in Contest 11757 (Pl. Ex. 33, 35; R. 1613-14, 1617-18). In Contests 11759 in a decision of October 8, 1931, the Commissioner, having been advised of service on seven of eight parties named, declared the Atlas claims 1-18 null and void to the extent of the interests of the parties served (Pl. Ex. 34; A. 83-84). No further adverse decision was ever entered with respect to the Atlas claims. In Contest 11761, following advice that service of notice of the charge of seven of nine parties named had been made and that no answers had been interposed in the contest, the Commissioner by letter of October 20, 1931, to the Register, declared the Camp Bird claims 1-20 "null and void to the extent of the interest of the parties served . . . " (Pl. Ex. 85; A. 1619). No further adverse decision was ever entered with respect to the Camp Bird claims.

The renewed post-*Krushnic* proceedings in Contests 11757, 11759 and 11761 were part of a campaign embracing hundreds of contemporaneous contest proceedings. One of the many was Contest 13003 commenced in 1931 against the Mt. Mamm claims 12-17 owned by the Virginia-Colorado Development Corporation. The Commissioner's decision in that case, a letter of January 20, 1932, declaring the claims null and void for failure to perform assessment work for the year ending July 1, 1931, was affirmed by Secretary Wilbur on May 24, 1932. *Virginia-Colorado Development Corporation,* 53 I.D. 666. That decision, which was not distinguishable on its facts or its reasoning from others being rendered by the Commissioner or the Secretary, became when the claimants sought judicial review the "second test case in the courts" which the Sec-

retary's 1930 report had said was to be expected. *Supra*, p. 25.

On March 10, 1933, in a suit for mandatory injunction a trial court in the District of Columbia reversed the Secretary's decision. On January 22, 1934, the Court of Appeals for the District of Columbia affirmed the decision of the lower court in the *Virginia-Colorado* case. 69 F. 2d 123. On review in this Court the decision of the Court of Appeals was unanimously affirmed in an opinion by Mr. Chief Justice Hughes. *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639 (June 3, 1935). The decision reaffirmed that prior to enactment of the Mineral Leasing Act the United States acquired no rights vis-a-vis the owner of a mining claim by virtue of any failure to perform annual assessment work. While the Leasing Act "inaugurated a new policy . . . by express provision the Act saved existing valid claims . . . 'maintained in compliance with the laws under which initiated' ", and the Court held that the plaintiff "came directly within the exception", which was a "part of the policy of the Act. Its terms explicitly declare the will of Congress as to valid existing claims, with full understanding of the status of such claims under prior law." *Id.* at 645-46. Chief Justice Hughes said that the "reservation" in the *Krushnic* opinion "does not aid the Government in its contention here" for a challenge to the claims, to be effective "must have some proper basis. No such basis is shown. We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law." *Id.* at 646-47.

Interior's Response to the *Virginia-Colorado* Decision

This Court's decision in the *Virginia-Colorado* case on June 3, 1935, touched off numerous inquiries to Interior from its employees in the field, as well as from members of the public and the Congress, as to the effect of that decision upon the status of other pending cases or earlier decisions which involved the assessment work charge. The replies reflected Interior's intention to deal with these particular situations for what they were, aspects of a single issue to be appropriately dealt with in one comprehensive response.[52]

The Department's response to the *Virginia-Colorado* decision, thus foreshadowed, was set forth by First Assistant Secretary Walters in a published decision in *The Shale Oil Company*, 55 I.D. 287 (June 24, 1935) (Pl. Ex. 70; A. 121-123). He reviewed the course of the second (post-*Krushnic*) phase of the assessment work controversy, the challenge by the mineral claimant to "the jurisdiction of the

52. For example, the Commissioner advised the Secretary of the Parachute Mining District, Grand Valley, Colorado, that "action on oil shale cases will remain suspended until final action is taken by the Department in the [*Virginia-Colorado*] case" (Pl. Ex. 66; A. 117-118). In another situation, Commissioner Johnson, in a letter of June 24, 1935, advised Senator Costigan that an inquiry (Pl. Ex. 67; A. 118-119) from a constituent, Joseph Ahearn, as to how he and the other locators of a group of oil shale claims in Colorado might clear their title "of the cloud placed upon it" by the Secretary's action against the claims in 1931 on the assessment work charge "which the Supreme Court of the United States in a decision put out on June 3rd declared to be beyond his authority", would be treated "as an informal request for reconsideration of the Department's decision of June 30, 1932, referred to above" and "transmitted to the Secretary of the Interior for his consideration" (Pl. Ex. 68; A. 119-120).

Department to prefer the [assessment work] charges," the decision of the Commissioner adverse to the claimant's contentions, and the contrary decision of the Supreme Court on that question in the *Virginia-Colorado* case. "In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as *without authority of law and void*" (emphasis supplied). Secretary Walters did not content himself with a statement adequate to dispose merely of the case before him. On the contrary, the decision continued in language intended to dispose not of a single skirmish but of a whole campaign.

> The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver* and *Federal Oil Shale Company* and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is reversed and the record in the case remanded with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clearlist the application for patent.

Just as after *Krushnic* the Department had acted to give effect to this Court's decision, so after *Virginia-Colorado* the Department again took the action appropriate to conform its administration of the law to the views expressed by this Court. It acted by a broad administrative ruling to avoid pointless individual lawsuits or rehearings in the Department to deprive of effect all prior assessment work

decisions, which were uniformly thereafter (until the present controversy) treated as nullities without effect in any respect.

1. Dismissal of Pending Cases

On the basis of the *Shale Oil Company* decision the Commissioner of the General Land Office in July 1935 addressed instructions to the Land Offices in the oil shale districts of Colorado, Utah and Wyoming as to the disposition of the pending assessment work cases in those offices:

> [I]n view [of the *Shale Oil* decision] and of the Department's action in remanding the Shale Oil Company case with instructions to reinstate the application and entry in toto and dispose of the same unaffected by the default in the performance of annual assessment work, you are instructed to close out on your records and transmit to this office all contest cases involving solely [the assessment work question] where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where answer has been filed by any of the contestees, you will transmit the records to this office without action (Pl. Ex. 71; A. 123-124; see also Pl. Ex. 72, 74, 75; A. 125-126, 127-129).[53]

Assessment work cases then pending on appeal before the Secretary or the Commissioner were disposed of on

53. Five years later there were still administrative loose ends to be tied, and in a further series of instructions in 1940 the Commissioner repeated his instructions of 1935, again on the basis that "in view of the rulings made [by the Supreme Court] and in the case of *Shale Oil Company* . . . the previous decisions of the Department declaring oil shale placer mining claims forfeited because of the failure of the

the authority of the *Shale Oil* decision.[54] For example, in one such case, *Joseph D. Ahearn,* Under Secretary West vacated a 1932 assessment work decision in recognition that "the action of the Department in declaring the claims involved forfeited was without authority of law and void" (Pl. Ex. 69; A. 120-121).[55]

Cases which were no longer pending in local Land Offices or on appeal in the Department were not matters on any docket and hence as to them there was no administrative record to be cleared, so no affirmative clerical action was needed such as that directed to be done as to cases in the Land Offices or such as the formal dismissal of pending appeals. Cases which had been completed prior to the *Shale Oil Company* decision thus required no action beyond that pronouncement itself. In the Department's subsequent and frequent occasions to consider assessment work contest decisions it was never regarded as material whether a case had been closed or was still pending when the *Shale Oil* decision was promulgated.

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claimants to perform the annual assessment work . . . were held to be without force and effect." In light of that the Registers were instructed to close out assessment work cases, if any, still pending and were notified that the assessment work charge, in any cases which presented that issue together with others, was dismissed (Pl. Ex. 82, 85, 87, 89; A. 139-140, 142-145; also Pl. Ex. 84; A. 141-142).

54. See, *e.g., United States* v. *Bloss,* July 30, 1935 (Pl. Ex. 76; A. 130); *United States* v. *U. S. Oil Shale Company,* July 30, 1935 (Pl. Ex. 77; A. 131-132); *United States* v. *K. C. Schuyler,* August 1, 1935 (Pl. Ex. 78; A. 132-136); *United States* v. *Wright,* August 13, 1935 (Pl. Ex. 45; A. 93-94); letter, dated August 19, 1935 from Commissioner Johnson to the Salt Lake City Register (Pl. Ex. 79; A. 137-138); letter, dated August 19, 1935, from Commissioner Johnson to the Denver Register (Pl. Ex. 80; A. 138-139).

55. Secretary West's decision also noted that inasmuch as no patent application had been filed for the claims, "the matter will stand

2. Reflection of the *Shale Oil* Decision in Interior Correspondence

Interior's intention that the *Shale Oil Company* decision should constitute across-the-board administrative action depriving of effect all previous departmental decisions based upon the assessment work charge is shown in correspondence conducted by Interior with representatives of both the legislative and executive branches of the Federal government, in internal communications among employees of Interior itself, and in correspondence conducted by representatives of Interior with the general public.

For example, in a letter of July 17, 1935, within three weeks of the *Shale Oil* decision, Commissioner Johnson wrote to Representative Taylor of Colorado that in *Shale Oil* the Department had "overruled its previous decision in conflict with the decision of the Supreme Court." He concluded that "it seems obvious that any declarations that [oil shale claims] were null and void, heretofore made by this office solely upon [the assessment work] ground, are without legal effect and void" (Pl. Ex. 175; A. 194-195).

In a letter of June 16, 1939 (Pl. Ex. 6; A. 68-69) to Chairman DeRouen of the House Committee on Public Lands, Secretary Ickes showed his appreciation that the oil shale assessment work campaign had been without effect:

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as if no adverse proceedings had been brought. If and when application for patent shall be filed for these placer claims such application will be considered on its merits. In the meantime, so far as the records of the Land Department are concerned, the lands involved appear and are regarded as vacant and unappropriated public lands." Thus, even a valid claim (so far as assessment work is concerned) is ignored by the Department until patent is applied for ("vacant and unappropriated public lands").

> Conceiving that the Mineral Leasing Act conferred such authority upon him, the Secretary of the Interior challenged in departmental proceedings the validity of thousands of these claims. After full hearings the claims were declared void because of default in assessment work. Appeal was taken from these proceedings and in the cases of *Wilbur* v. *Krushnic*, 280 U. S. 306 (1930) and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639 (1935) the Supreme Court held that the proceedings exceeded the authority of the Secretary and were, therefore, without effect. From these decisions it is apparent that, although the performance of annual assessment work is expressly required by law, there is no statutory authority to enforce that requirement (A. 69).

In a letter of March 21, 1946, to Senator Myers in response to an inquiry about the Oil Dome oil shale claims, Acting Secretary Chapman, after noting that Interior's records showed that the oil shale claims in question had been declared null and void on November 10, 1931, for failure to do assessment work, advised the Senator that:

> However, in the case of the Oil Shale Company (55 I.D. 287, 290), decided June 24, 1935, the Department recalled and vacated its action in the Virginia-Colorado Development Corporation case (53 I.D. 666), and overruled its action in other cases, including this one (Pl. Ex. 204; A. 227-228).

The Oil Dome claims, like those here, were purportedly cancelled in proceedings in which none of the claimants appeared or answered, and in which no administrative appeal was taken and no judicial review then sought (Pl. Ex. 205; A. 228-229).

Statements made and advice given to members of the public were no less unequivocal in making clear the Department's consistent position that the action taken by it following upon the Supreme Court's decision in the *Virginia-Colorado* case had served to deprive of effect all assessment work contest decisions. This appears, for example, in a letter of July 17, 1935 (Pl. Ex. 136-A; A. 183-184) from Commissioner Johnson to Edward Altenbern of DeBeque, Colorado. In that letter the Commissioner noted that the *Shale Oil Company* decision had "recalled and vacated its decision in the Virginia-Colorado Development Corporation case and overruled all its previous decisions in conflict with the decision of the Supreme Court."

> You are, therefore, advised that so far as the jurisdiction of this office is concerned, any declaration by it that an oil shale placer claim is null and void based solely on a charge that the claimant failed to perform annual assessment work or resume work on the claim is void and does not affect the right of the owner of the claim to maintain his possession thereof under the mining laws (A. 184).

The Commissioner made the same point in correspondence in 1936 with Ida Dere, a resident of Grand Valley, Colorado. Mrs. Dere had written to Commissioner Johnson (Pl. Ex. 181; A. 200) that representatives of Interior had convinced her in 1927 or 1928 "that it would be useless to go to the extent of answering the Government contest", but referring to the Supreme Court decision in *Virginia-Colorado,* which "seemingly has set at naught all of these former challenges," she asked the Commissioner to "please clear list my said claims or advise me what must be done to get them clear listed". In reply (Pl. Ex. 180; A. 199-

200) the Commissioner advised Mrs. Dere that Interior's records showed that the claims in question, the Lucy Agnes Nos. 1 and 2, "were declared null and void by this office on August 18, 1930, because of failure of the owners of the claims to file answer denying the charge that annual assessment work had not been performed on the claims for the year ending July 1, 1929, and that work had not been since resumed". Notwithstanding that the decision in the case was rendered upon the claimants' default, it was the Commissioner's unequivocal position that no action needed to be taken:

> In view of this holding of the Supreme Court, this office considers that it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the title arising from the location of the claims.[56]

Interior's understanding of the effect which the assessment work decisions possessed after the Department's pro-

56. The Lucy Agnes Nos. 1 and 2 were two of the claims on appeal in the *Union Oil* decision of April 1964. See 72 I.D. 313, at 325-326. The successors of Mrs. Dere therefore were among those to whom the legal conclusion of *Union Oil* was addressed, that a "failure" to take action to obtain a reversal of an assessment work decision elevated that decision to the rank of a conclusive and binding determination.

The obvious basis for the difference between the view expressed by the Commissioner to Mrs. Dere, that formal reconsideration of the assessment work decision was not necessary, and the action taken by the Department in the *Ahearn* case, pp. 30, 33, *supra*, where a request for advice as to the status of such a decision resulted in a formal revocation of the decision, was that in *Ahearn* the request for advice had been received after *Virginia-Colorado* but prior to the promulgation of the *Shale Oil* decision and that inasmuch as the *Ahearn* case had been individually reopened a formal individual disposition was required.

nouncement in the *Shale Oil* case (that they had no effect) and its view as to the action which a claim owner needed to take to free his claims from the shadow of those decisions (that he needed to take no action) are shown also in correspondence in 1936 between Commissioner Johnson of the General Land Office and Alexander Bowie, Esq., a lawyer in Grand Junction, Colorado, who inquired on behalf of an estate whether "any proceedings may be required . . . to reestablish record of its rights in [oil shale] claims" which had been declared null and void for failure to do assessment work (Pl. Ex. 182; A. 201). The Commissioner in reply (Pl. Ex. 183; A. 202) summarized the action taken by the Department in *Shale Oil* and concluded that "it is clear that a declaration holding a mining claim to be null and void because of failure to perform the annual assessment work is without effect and that the owner of the claim would still be entitled to resume work on the claim in the same manner as if no adverse decision had been made."[57]

Numerous other documents in the record show Interior's clear understanding that assessment work decisions were

57. The oil shale claims there in question had been the subject of three different assessment work contests, two of which ended in decisions which, like the decisions in Contests 11757, 11759 and 11761 involving the claims here, were default decisions in proceedings in which no answers were filed by the parties named in the contest complaints. This obviously had no bearing on Commissioner Johnson's conclusion that the decisions were "without effect." The third contest resulted in a decision against certain Phenol claims rendered after a hearing at which the evidence of the Government's witnesses as to the non-performance of assessment work was evidently not controverted. In that case the Commissioner's decision noted the contestees' right of appeal to the Secretary from his adverse decision. No such appeal appears to have been taken (Pl. Ex. 184, 185; A. 202-204). This likewise was immaterial.

to be held wholly without effect. *E.g.*, the Commissioner's letter of February 14, 1944, to Warren Paddock of DeBeque, Colorado (Pl. Ex. 196; A. 217-218), that a default assessment work decision of August 16, 1930, had been "rendered ineffective"; correspondence between W. Porter Nelson, of Denver, Colorado and the Department (Pl. Ex. 197-199; A. 218-222), in which Commissioner Johnson wrote that the *Shale Oil Company* decision had held that the adverse proceedings "based on charges of failure to do annual assessment work must be held as without authority of law and void"[58]; and the letter dated March 27, 1946, from Commissioner Johnson to lawyers in Grand Junction (Pl. Ex. 207; A. 229-231) in the course of which the Commissioner set forth the familiar statement that "the failure to do the assessment work could not be made the basis of a contest by the government, and that the failure did not work a forfeiture of the claims to the government, but only rendered them subject to loss through relocation by some other persons . . . ."

58. Some of those "void" decisions had been rendered on default, others after answer. The Commissioner's treatment of them as the same is further evidence that the procedural status of the assessment work cases was an immaterial factor.

3. The Void Character of Assessment Work Decisions Shown by the Knowing Issuance of Patents for Claims Declared Invalid on that Ground

A third way in which Interior showed by persistent practice its recognition that the consequence of the *Virginia-Colorado* decision and the Department pronouncement in the *Shale Oil Company* in 1935 was to deprive of all effect the assessment work decisions rendered in Department contests, was in the issuance after 1935 of patents for hundreds of oil shale claims that prior to 1935 had purportedly been declared null and void for nonperformance of assessment work. Plaintiffs' Exhibit 96, A. 148-157, is a tabulation of all oil shale patents issued in Colorado upon applications which were filed after the promulgation of the *Shale Oil Company* decision in 1935. It shows that, of 768 claims which were patented, 507 had been declared null and void solely on that charge. In terms of patent applications rather than individual claims, 71 of the 106 successful applications for patent[59] on Colorado oil shale claims which were filed after the *Shale Oil Company* decision involved one or more claims that had been declared null and void solely for nonperformance of assessment work. Plaintiffs' Exhibit 96, R. 1842, reprinted in reduced size on the opposite page, is a map which shows pictorially the information tabulated in Exhibit 95.

The record below contains a wealth of evidence which shows that these patents for claims which had been the subject of adverse assessment work decisions were issued with full knowledge of the fact of that history.[60] The evi-

59. The 71 are tabulated at A. 148-152; all 106 are listed at A. 152-157.

60. The Government brief to this Court, understandably, hardly notes the fact (". . . it would be impossible to deny that patents have been granted despite such cancellations," p. 64).

dence disposes of any possibility that the issuance of these patents constituted a kind of massive inadvertence of unparalleled scope and duration.

That the approval of claims for patent and the issuance of patent despite prior assessment work contest decisions purportedly invalidating the claims was consistent and avowed Interior practice over many years is shown in a variety of ways. For example, witness William Shafer, formerly Chief, Branch of Mining, in the Bureau of Land Management from 1955 to 1965 (A. 286), testified in a deposition that when he assumed his duties in Washington in 1955 he was instructed in several conferences with higher officials in the Bureau of Land Management and in the Solicitor's Office that "insofar as issuing patent [is concerned], if the charge of failure to do assessment work was the only charge, it was to be ignored, and had been ignored" (A. 298).

Numerous mineral examiners' reports on oil shale claims that went to patent explicitly noted the fact of prior contest decisions and indicated an awareness of their ineffectiveness. Thus, a mineral report (Pl. Ex. 119; A. 162-163) approved by J. Elliott Hall, Lands and Minerals Officer in the Colorado State Office,[61] notes both an administrative assessment work decision and also the later *Shale Oil* decision. The recommendation in the report that the claims be clearlisted and allowed to proceed to patent, which Hall had approved, was thereafter joined in also by the local Land Office, by the officials participating in issuance of Final Certificate, by the Minerals Staff Office in Washington, and by the Patent Office in Washing-

61. Hall testified in a deposition that it was his invariable practice to approve a mineral report only if he had read it and in fact approved it as reflecting the proper application of Interior policy to the facts of the case (A. 282).

ton. The patents themselves were issued in 1956 and 1957 (Pl. Ex. 120-123; A. 164-165; Pl. Ex. 124; R. 1892). In another example a 1958 memorandum to the Lands and Minerals Officer (Pl. Ex. 128; A. 175-176) summarized a 1927 investigation of the claims and assessment work proceedings in Contest 11749, stated that the adverse decision in that proceeding was "of no avail and did not affect the status of the claims." In a memorandum of December 30, 1958, the acting Land Office Manager forwarded the application to Washington for "consideration and issuance of patent, if in order" noting that apart from some question of a stock-raising homestead entry "there are no other conflicts" (Pl. Ex. 130; A. 177-178). Patent issued January 9, 1959 (Pl. Ex. 131; R. 1906).

Other examples abound. A February 27, 1958, Mineral Work Sheet on application C-020379 contains the notation "Contest 12261 involved failure to do assessment work and is immaterial" (Pl. Ex. 135; A. 182), and in the same case Manager Andrus of the Colorado Land Office stated in forwarding the application for issuance of patent that contest 12261 "is not considered as a bar to issuance of patent in the subject case" (Pl. Ex. 136; A. 183). Another report, of November 21, 1955 (Pl. Ex. 138; A. 185), noted that an adverse contest decision on assessment work grounds "was overruled by the Departmental Decision on June 24, 1935, 55 L.D. 287, which held [in view of *Virginia-Colorado*] that the Department of Interior had no authority to declare a claim void for lack of performance of annual assessment work." The Director of the Bureau of Land Management in a memorandum dated February 23, 1960, referred to patents issued on 30 oil shale claims: "The claims were subsequently contested and declared null and void for non-performance of assessment work. This

declaration of invalidity had no effect and did not proscribe subsequent issuance of patent" (Pl. Ex. 154-A; A. 192).

In addition to direct references to assessment work decisions which appear in the files of patent applications for oil shale claims the evidence shows (1) that the assessment work decisions were generally recorded on the tract books or the special oil shale plat books maintained in Washington, and frequently in both places (A. 294-295; Def. Ex. R-R; R. 8585); (2) that recourse to these books during the processing of oil shale patent appplications was required (see 43 C.F.R. § 1813.1-1(b) (1967): "...it is... necessary that notations be made on the tract books and plats of all applications and entries of public land ... in order that the status of a tract may be readily ascertained"); and (3) that officials who were personally familiar with the assessment work decisions had large roles in the subsequent patenting of oil shale claims attacked on that ground.

For an example of the last point, Clarence R. Bradshaw, an attorney who had been with the Land Office since 1921 and who was Chief of the Branch of Adjudication of the Land Office from 1947 through 1951 (Pl. Ex. 306; A. 273-274), continued to take an active part in considering oil shale applications throughout the 1950's (Deposition of William L. Shafer, A. 298, 303). He had served as an investigator in the field during the assessment work campaign (Pl. Ex. 283, R. 4581-82, is an adverse field report which Bradshaw prepared in 1931 in Denver) and thereafter worked in Interior's Washington Office and was familiar with the *Shale Oil* decision.[62] It was he who adju-

62. His surname or initials appear on many documents evidencing the application of the decision. See *e.g.*, Pl. Ex. 72, 175, 180, 183, 198, 199, 207, 215; A. 125, 194, 199, 201, 219, 221, 229, 239, which

dicated the third and fourth patent applications (see Pl. Ex. 95; A. 148) which resulted in the issuance after *Shale Oil* of patents on claims that had been purportedly declared invalid in assessment work decisions prior to that case. Bradshaw was well aware, in processing the applications to patent, of those prior adverse assessment work decisions.[63]

It was the same Clarence Bradshaw, who, as Associate Solicitor for Public Lands, thus spoke from an unrivaled personal acquaintance with the matter when he replied in 1959 to the first suggestion from the Denver Regional Solicitor's office that old assessment work decisions should be made the basis of pleas of *res judicata* to bar pending patent applications:

> You raise the question whether under the doctrine of *res judicata,* those claimants who failed to appeal from the Commissioner's decisions or resort to the courts where a departmental decision was concerned, now are foreclosed from asserting any rights under their locations notwithstanding later Supreme Court decisions (*Wilbur* v. *Krushnic,* 280 U.S. 306 and *Ickes* v. *Development Corporation,* 295 U. S. 639), holding that the Government was not concerned in a claimholder's failure to do the

are documents ranging in date from July 17, 1935, to December 3, 1959. "Surnaming" a document, which generally involved entering a surname or initials in the upper right corner of a file copy of the document, was a practice of long standing in Interior the purpose of which was to record the identity of each person who "had read and approved [the document for] signature," and as "a notification to your superior that you had reviewed and agreed with the contents ..." (Deposition of William L. Shafer, A. 291-294).

63. The work check forms in these two cases (Pl. Ex. 295, 296; R. 4653-54) were prepared by Bradshaw in 1949, who noted on each that the tract books showed no conflicts. The tract book pages (Pl. Ex. 102, 103, 105; R. 1860, 1861 and 1863) showed that the claims had been declared null and void.

assessment work and that it could not declare a forfeiture of a claim because of such failure.

In view of the Supreme Court decisions mentioned, the Department in its decision of June 24, 1935, in the *Shale Oil Company* case (55 I.D. 287) held that in that case the Commissioner's decision was without authority of law and void; recalled and vacated certain cited departmental decisions and the departmental instructions of June 17, 1930 (53 I.D. 131); and overruled "other departmental decisions in conflict with this decision." Thus in effect the decision of June 24, 1935, recalled and vacated *all* departmental decisions declaring oil shale placer claims null and void solely for failure of the claim owner to do the assessment work, thus leaving the claims as if they never had been contested (Pl. Ex. 215; A. 238-239; emphasis in the original).

The Regional Solicitor in turn promptly advised the Colorado State Supervisor by letter dated December 11, 1959 (Pl. Ex. 156; A. 192) that "it is the position of the Department that the decisions of the Commissioner of the General Land Office involved herein were void and of no effect in this connection, were subsequently withdrawn and, as a result, the plea of previous judgment or *res judicata* is not to be applied in these or similar [oil shale] cases."

Interior's Change of Position

In August 1961 the Regional Solicitor's Office addressed Mr. Bradshaw's successor with the renewed suggestion that the assessment work decisions provided a basis for insisting upon the invalidity of oil shale claims. In doing so it stated "We recognize that it has been the custom of the Bureau of Land Management to ignore the effect

of these decisions in adjudicating oil shale patent applications" (Pl. Ex. 157; A. 194). On September 22, 1961, the Solicitor's Office authorized the Regional Solicitor to advise the Colorado State Director to dismiss pending patent applications on the ground of the assessment work contest decisions (Pl. Ex. 218; A. 241).[64]

The Land Office Manager implemented the Solicitor's views in eighteen substantially identical decisions issued in February 1962.[65] On appeal, in consolidated proceedings decided under the title, *Union Oil Company of California*, 71 I.D. 169 (1964), the legal position which the Solicitor's Office had advised the Land Office Manager to adopt in the decisions appealed from was affirmed.[66]

The claims in suit were not involved in *Union Oil*, and indeed have not been before the Department since the 1931 decisions of which review is sought. It was, however, obvious that after *Union Oil* judicial relief from those 1931 decisions was now required. This action to obtain that relief was therefore promptly commenced.

The plaintiffs advanced three distinct grounds for relief in the District Court going to the merits of the 1928-1931 decisions, and a fourth ground for relief based on the procedural irregularities of the proceedings. The plaintiffs

64. The course thus directed, that of simply dismissing the applications, of course gave the patent applicants no notice of or opportunity to meet the charge.

65. The Solicitor's position was conveyed by the Denver Regional Solicitor (Pl. Ex. 219; A. 242).

66. The documents in the record in this action which show the circumstances of the Department's change of position were obtained pursuant to Rule 34 only over the Government's vigorous objection. The assertion of executive privilege was overruled by the District Court after *in camera* inspection of the documents. At the time of the events themselves, the parties involved in the decisions of the Land Office Manager in 1962 took appeals under the Department's procedures unaware that the matter had already been considered.

asserted (see App. 32) that the decisions were invalid and of no consequence

(a) because the Secretary lacked the fundamental power—subject matter jurisdiction—to render them, and hence they were void;

(b) because, even if the Secretary possessed the subject matter jurisdiction to render them, they were wrongly decided and are therefore now subject to direct judicial review and reversal; and

(c) because, whether or not the decisions were void or wrong, the Secretary in 1935 had administratively set them aside and established and thereafter maintained a consistent administrative policy that they and other similar decisions were to be treated in all respects as nullities, a policy from which the Secretary could not *retroactively* depart to the prejudice of the paintiffs (whatever might be his power *prospectively*).

The fourth ground on which the plaintiffs relied was that, upon the basis of principles announced by the Secretary himself, it was indisputable that the administrative proceedings in which the decisions had been rendered were substantially defective for failure to obtain personal jurisdiction over the then owners of interests in the claims.

The Government's answer raised the affirmative defenses of laches and estoppel (App. 22), upon which, however, it offered no proof and which in effect it abandoned.[67]

67. The laches defense of course asserted reliance. The Government's answers to interrogatories, however, admitted that there had been none (Pl. Exs. 313, 314; A. 305-312). In its post-trial brief to the District Court, the Government confirmed that point and indeed went the further step of asserting that it did not even contend that the Department *knew* of the decisions (Brief for Defendant, pp. 59-60).

After trial upon an extensive record[68] the District Court gave judgment for the plaintiffs but ruled explicitly only upon the first ground advanced, that the 1928-1931 decisions were void for lack of the fundamental power to render them. Its opinion appears at pp. 26-47 of the Appendix. The Court of Appeals unanimously affirmed, essentially on the same ground (App. 434-446). The opinions of both Courts, however, show a recognition of the failure of the laches defense and acknowledge the elaborate evidence of the Department's long-standing administrative practice (App. 42-45, 47; 441, 445).

Summary of Argument

I

The fundamental question presented to the courts below was whether administrative decisions rendered by the Department of the Interior in the period 1928-1931 which purported to cancel the oil shale claims in suit for nonperformance for one year of annual assessment work should be set aside on direct judicial review. That the old decisions were final adjudications which when rendered were subject to judicial review is established both by explicit concession in the Department's *Union Oil* decision and by a consideration of the Department's adjudicatory practice at the time.

The extensive record establishes clearly that the Government's pleaded defense of laches cannot be sustained to bar direct judicial review. In its answers to interroga-

68. The record in the case as paginated by the clerk of the District Court comprises some 9,000 pages, much of it introduced by the Government.

tories and concessions in its post-trial brief to the District Court, the Government has admitted that there has been no element of reliance on the supposed effectiveness of the old decisions. On the contrary the evidence shows, as the plaintiffs urged in the courts below, that from the time of this Court's decision in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, in 1935 until the present controversy arose, the Department, giving effect to this Court's pronouncement, had itself deprived the old decisions of effect and otherwise administered oil shale lands, in every context in which the question arose, upon the basis that those decisions were themselves nullities.

These circumstances establish that if the old decisions were merely erroneous, they were correctly set aside below, whether or not the Secretary lacked, as the courts below found he lacked, subject matter jurisdiction to render the old decisions. That such decisions *were* erroneous was the explicit holding of this Court on two prior occasions, *Wilbur* v. *Krushnic*, 280 U. S. 306; *Ickes* v. *Virginia-Colorado Development Corp.*, *supra*. Those two decisions, both unanimous, carefully canvassed and rejected the substance of the arguments now raised by the Government.

The conclusions expressed in the two prior opinions of this Court were correct. Under the basic mining laws, which govern the validity of the claims in suit, the Government concededly had no interest in the performance of assessment work. There was not, contrary to the Government's contention here (repeating the contention made to this Court in *Krushnic*), any line of authority establishing such an interest as to land covered by withdrawals. Nor did the Mineral Leasing Act create such an interest. The language of the statute is inapt for that purpose; had Congress intended such a result statutory precedent lay

ready at hand. The very theory upon which Congressional interest in oil shale was expressed, that its potential value to the country required time-consuming and expensive research and process development, is directly at war with any notion that it was the legislative intention that claims on which largely meaningless assessment work was not continuously performed should be forfeited, for that would have removed the incentive, which the prospect of production from owned reserves held out, for the very investment and effort needed to bring the benefits of the resource to the country. The Government's argument as to the intention of the Congress is, moreover, flatly in contradiction to the contemporaneous statements of members of the Congress responsible for the legislation.

II

The controversy over assessment work on oil shale claims which lasted from the mid-1920's, when the Department insisted upon its right to challenge oil shale claims for non-performance of assessment work, through the Department's promulgation in 1935 of *The Shale Oil Company* decision, acknowledging, after this Court's two decisions, that the Department had no authority to challenge claims on that ground and that its decisions purporting to cancel claims for that reason were themselves without effect, was in explicit terms a controversy over the subject matter jurisdiction of the Department. That characterization of the issue appeared in the Department's decision in *Emil L. Krushnic (On Rehearing)*, 52 L.D. 295, 306 (1928), and was reiterated in Secretary Wilbur's explanation to the Congress in 1931 that what the resumed campaign after the decision of this Court in *Krushnic* was intended to test was "the authority (if any)" left to the

Department by that decision. Most conspicuously of all, the second decision in this Court in *Virginia-Colorado* was in terms a ruling, not that the Department had merely committed an error of law, but rather that the Department's challenge on the assessment work ground and its adverse proceedings, as well as its decisions, were "without authority." The Government's argument to the Court in that case had rested upon a theory that required a decision in jurisdictional term, and the Court's opinion was responsive.

The decision was moreover correct in holding that the Secretary lacked authority or subject matter jurisdiction. The Secretary's adjudicatory function is implied by necessity to permit him to act effectively where the statute creates rights or duties he is obliged to protect. Numerous cases in this Court support that principle, including the leading case of *Cameron* v. *United States*, 252 U. S. 450, relied on by the Government here (as it was in both *Krushnic* and *Virginia-Colorado*). The performance of assessment work is not related to any such statutory right or duty imposed upon the Secretary, and he therefore lacks authority to pursue the subject. That there is in fact no conflict in doctrine is evidenced also by the circumstance that Mr. Justice Van Devanter, the author of the opinion for the unanimous Court in *Cameron*, was a participant in the likewise unanimous decisions in *Krushnic* and *Virginia-Colorado*.

III

A decision in this case which called in question the prior unanimous decisions in *Krushnic* and *Virginia-Colorado* would ignore more than a quarter-century of legislative history showing Congressional acceptance of the result

announced and a building upon it. It would also overthrow established administrative policy established by Secretary Ickes in 1935 and consistently adhered to by his successors until, in 1964, the Department in its *Union Oil* decision confirmed a departure from it. The Government points to stability of law, and the particular force of that consideration in the context of title to land, as the touchstone: the weight of that consideration bears heavily in favor of an adherence to the prior decisions of this Court, which have been followed and applied for thirty years and which involve only a question of statutory construction, not any point of constitutional dimension. *Cf. Erie R.R.* v. *Tompkins,* 304 U. S. 64, 77. Moreover, the Congress now has under active consideration the extensive revision of the public land laws, including the mining laws with their provision for assessment work. There is thus no occasion for the Court to intrude upon the subject out of any conviction that it will otherwise be ignored.

ARGUMENT

POINT I

The 1928-1931 assessment work decisions were final administrative decisions which are now properly before the Court on direct review, for the asserted defense of laches has in substance been abandoned and is, in any event, wholly unsupported in the extensive record; the unanimous decisions of this Court in *Krushnic* and *Virginia-Colorado* twice set aside similar administrative decisions and correctly held that nonperformance of annual assessment work on oil shale claims did not forfeit the claims to the United States.

Both the District Court and the Court of Appeals held that the plaintiffs were entitled to judicial relief from the 1928-1931 administrative assessment work decisions here in suit. The explicit basis for that conclusion in each court was that the Secretary lacked the fundamental power or subject matter jurisdiction to render them, and hence they were void and could provide no basis now for a holding that the claims in suit were invalid. On that reasoning the District Court granted, and the Court of Appeals affirmed, a judgment declaring the decisions to be without force or effect and enjoining the Secretary from asserting their validity (A. 48-51). The Government does not, of course, dispute the conclusion reached by the courts below, given the premise. Rather it argues that the prior decisions of this Court in *Wilbur* v. *Krushnic*, 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, followed by the courts below, are not to be read as denying the Secretary's subject matter juris-

diction. The deficiencies in this aspect of the Government's argument are the subject of Point II of this brief (pp. 94-107).

The Government deals with the question of subject-matter jurisdiction as the principal point in its argument, as if to suggest that it is the dispositive question before the Court. That could not possibly be true unless the only review now available of the 1928-1931 decisions were collateral.[69] Inasmuch as this case presents *only* a question of direct review, it will be obvious that the question of subject-matter jurisdiction *vel non* is not the crux of the case—however clear it is, as we show in Point II, that the Secretary did lack such authority. On direct review the prior decisions should of course be set aside if merely erroneous, whether or not they suffer from the more fundamental deficiency that they were rendered by a tribunal which lacked power to do so (or were rendered in the absence of personal jurisdiction over necessary parties). The Government does not dispute that the case presents a question of direct review, but except for a two-line footnote (note 20 on page 47), its brief is devoted to the question of review "in collateral proceedings" (p. 47). Because of the possible confusion thus engendered, it appears necessary first to summarize briefly the actual procedural posture of this case.

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69. In fact, even acceptance of the Government's labored argument that the Secretary possessed subject matter jurisdiction to render the decisions would not free them from collateral attack, were it material to consider whether they were subject to collateral attack. Quite apart from the issue of subject-matter jurisdiction, the 1928-1931 decisions were substantially defective for failure to obtain personal jurisdiction of then owners of substantial interests in the claims (see pp. 118-119, below). As the Government's brief necessarily concedes, "defect of process" is one of the circumstances in which administrative action is "subject to being ignored or to collateral attack" (p. 28).

Inasmuch as the case thus presents a question of direct review, the central question is whether the 1928-1931 decisions were infected with legal error. Whether that question be considered on principle or on authority, it must be given an affirmative answer. The prior decisions of this Court in *Krushnic* and *Virginia-Colorado,* in disposing of contentions markedly similar to those now advanced by the Government in arguing that *Virginia-Colorado* should be overruled, twice set aside assessment work decisions indistinguishable from the decisions here. In principle, those decisions were right, for oil shale mining claimants had no such obligation vis-a-vis the United States to perform annual assessment work as to forfeit their claims for failure to perform it. As the plaintiffs argued as an alternative ground for decision below, the 1928-1931 decisions should be set aside because erroneous. The decisions below were rightly decided, and upon familiar principles the judgment below should be affirmed here, if on any ground presented it is sustained.[70]

A. The 1928-1931 decisions were administratively final decisions subject to direct judicial review when rendered, and they remain subject to such direct review, for the pleaded defense of laches is without support and has in substance been abandoned.

That the 1928-1931 decisions were administratively final decisions subject to judicial review without need for further recourse to administrative procedures was conceded in the Solicitor's *Union Oil* decision. There, in considering the courses of action open to oil shale claimants

70. See *Helvering* v. *Gowran,* 302 U. S. 238, 245; *United States* v. *American Ry. Exp. Co.,* 265 U. S. 425, 435.

involved in administrative assessment work decisions similar to those here, the opinion stated (71 I. D. at 180-181; A. 367):

> . . . we do not question that the appellants or their predecessors in interest could have invoked judicial review of the Department's decision under applicable precedent, even though the time within which the claimants could have appealed to the Secretary had expired. The claimants, following the decision in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* had at least two alternatives open to them to protect their claims. They could have petitioned the Secretary to exercise his supervisory authority to recall and vacate the Land Commissioner's cancellation of the claim as he had done in *The Shale Oil Company, supra,* or they could have sought relief in the courts in proper proceedings instituted for that purpose. . . . (footnotes omitted)

No doubt in recognition of the point, the defense of a failure to exhaust administrative remedies, raised by motion in advance of answer (A. 16) and denied by the District Court (235 F. Supp. 606), has not been further pursued by the Government.[71]

What was conceded in the *Union Oil* decision is equally compelled by a consideration of the procedures which governed the old contests. In summary, what the applicable Department rules envisaged was a procedure in which (1) the Department decided the general point of law, (2) a contest complaint was thereafter issued asserting facts which if established would bring into play the legal rule already adopted, and (3) the claimant upon whom the contest complaint was served might, by appearing and offering evidence at a hearing, controvert the

71. It did not brief the point in the Court of Appeals.

facts if he chose to do so, but if he did not, the rules provided that his failure would constitute an admission of their truth, obviating the need for a hearing.[72] Appeals were appeals on the facts, and where there was no factual controversy there was obviously no need for an appeal, and the rules explicitly provided that in such a case no appeal within the Department would lie.[73] The Commissioner's decision in any case in which the contestees preferred not to contest the facts thus constituted a final administrative decision immediately reviewable in the courts on the question of law involved, although of course not on any question of fact which on this procedure had been conceded for purposes of the case.

The course of action contemplated by the Department's rules was precisely what was done in the proceedings here. Thus, in the post-*Krushnic* phase, first came the general instructions to challenge all claims on which assessment work was in default and had not been resumed.[74] Then, when the field investigators reported back on June 23,

72. See Circular 460, *Proceedings Upon Reports of Special Agents* (that is, Government contests), 44 L. D. 572 (1919), paragraphs 7-9 and 11-14, supplemented by the more general Rules of Practice, which as promulgated in 1926 (51 L. D. 547) were in effect throughout the period of controversy. This sharp distinction between the Department's determination of the law and the ascertainment of facts in a contested proceeding in the General Land Office was succinctly summarized by Mr. Justice Brandeis in *West* v. *Standard Oil Co.*, 278 U. S. 200, 207.

73. Rules 49 and 75 of the *Rules of Practice*, 51 L. D. at 556, 560 (1926), 43 C.F.R. §221.49, §221.75 (1949).

74. The original instructions to the field were those from the Secretary and the Commissioner of January 15, 1930 (Pl. Ex. 16; A. 70-71), followed by instructions in April 1930 that posting of challenges should be made promptly "to be followed by the direction of adverse proceedings by this office, in the usual way...." (Pl. Ex. 18; A. 72-74). See, also, *Instructions, Government Proceedings Against Oil Shale Claims for Default in Assessment Work*, 53 I. D. 131 (1930).

1930 that assessment work had not been resumed on the claims in suit (Pl. Ex. 27; R. 1600), contest notices were promptly sent out. The decisions of the Commissioner in 1931, after defaults in appearance, thus constituted final administrative adjudications[75] and were, as the *Union Oil* decision concedes, then subject to judicial review.

Not only were the 1928-1931 decisions final adjudications subject to judicial review when rendered. They remain subject to judicial scrutiny on direct review. As the Government conceded in the District Court (A. 61), no statute of limitations fixes the time within which judicial review of an administrative decision of the Department must be sought. On the other hand, the Government's answer (A. 22) asserted the defense of laches, alleging that after the assessment work decisions the United States, "relying upon the established invalidity of the claims, entered into oil and gas leases covering much of the area involved and otherwise administered the property as being free and clear of plaintiffs' claims." The difficulty with the laches defense was not, as would have been true of a defense of the statute of limitations, that it is not available as a matter of law. The difficulty, equally formidable, is that there is not a shred of evidence to support it. As the Court of Appeals stated: "It is not a question of laches . . ." (A. 445). Judge Doyle in the District Court had made essentially the same point when he found that "there is a dearth of evidence to establish acquiescence, express or implied, in any assumption of jurisdiction by the Department" (A. 47).

There has of course been no dispute between the parties that laches will bar an assertion of rights only if there is

75. In recognition that no further administrative appeals were available, the Commissioner's decisions recited that "The case is closed" (Pl. Ex. 32, 34 and 36; A. 83, 84, 86).

some causal connection between an assertion of the right and subsequent action taken by the person asserting the defense. *Costello* v. *United States*, 365 U. S. 265, 282 ("Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense"); *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206, 215; *Northern Pac. Ry.* v. *Boyd*, 228 U. S. 482. The defendant's answer, indeed, is phrased in recognition of these indispensable elements of unwarranted delay, causality and prejudice. Far from establishing those elements, however, the history of the administration by the Department of oil shale claims as reflected in the record before this Court shows with unmistakable clarity that the Department's consistent view was that the claims supposedly cancelled by the old decisions, like those rendered here, were to be treated as if those decisions had never been rendered. So far from *relying* on the effectiveness of the decisions, as its answer asserted, the Department has acted in every context in which the question arose from precisely the opposite view of the decisions: that they had no effect whatever. This view reflected the Department's understanding that, as this Court had twice ruled, the United States had no concern with the performance of assessment work, that the Department had exceeded its statutory powers in inquiring whether such work had been performed, that the purported cancellations of oil shale claims for non-performance of assessment work were themselves void, and that, after the decisions of this Court, the Department had by general administrative action itself rendered the prior decisions ineffective. Evidencing this view, the Department informed the public and the Congress that the decisions were nullities, it sought legislation upon the premise that

the decisions were wholly nugatory,[76] and, as noted, it has issued patents over a period of a quarter century covering claims against which it knew assessment work decisions had been rendered. Only since the Department's about-face after 1960 has any different view of the decisions been taken.[77]

That there is no evidentiary basis for a laches defense is established not only by the many individual items of evidence in the record, which affirmatively show that no one believed the assessment work decisions were effective, let alone relied upon their effectiveness, but also by the answers given by the Government to interrogatories directed to the particulars, if any, of the matters in which, as asserted in the answer, the Government "in reliance" upon the invalidity of the decisions had done anything in administering the lands.[78] The answers established that the Government had no evidence whatever that any oil or gas leases had been issued in such reliance; they stated that it was "impossible to establish" that any grazing privileges had issued in such reliance; that the Govern-

76. See pp. 110-112, below, as to post-1935 legislative history.

77. Whatever may have been the Government's initial reluctance to admit the change of position, the evidence leaves it wholly clear that that is precisely what occurred. Pl. Ex. 211; R. 2087-2098, for example, is a stipulation between counsel as to the admissibility of two letters written in 1963 by the then Assistant Secretary for Public Land Management to Sen. Clinton Anderson, in which (see A. 235-237) the Secretary stated unequivocally that until 1958 no question was raised as to the point that the *Shale Oil Company* decision in 1935 had effectively obliterated the assessment work decisions. The stipulation itself states that the matters referred to in the letters fell within the jurisdiction of the Assistant Secretary for Public Land Management and that he was generally familiar with them (R. 2088).

78. The Interrogatories and answers in this action in the District Court appear as Pl. Ex. 313; A. 305-310, R. 945. Largely similar interrogatories were propounded in the *Brown* case. Those interrogatories and the answers appear as Pl. Ex. 314; A. 310-312, R. 945.

ment in fact did not know whether the United States had in any respect ever administered the lands as being free and clear of the claims, and that the Government had no information that any third parties had ever acted in reliance upon the invalidity of the claims. In its post-trial brief to the District Court, the Government explicitly abandoned any contention that "administration of the lands was affected by any particular reliance on the earlier decisions" (Brief for Defendant, p. 60). While it has not in terms abandoned the laches defense, the Government has conceded that the record establishes conclusively that there is no basis upon which such a defense could be sustained.

The concept of laches rests of course on the notion of unwarranted delay. The very suggestion of a supposed "delay" in the asserted "failure" of the plaintiffs or their predecessors to seek earlier relief from the assessment work decisions has an Alice-In-Wonderland quality about it. The voluminously documented record suggests, quite to the contrary, that had relief been sought at any time after the *Shale Oil Company* decision in 1935, the plaintiffs would have faced substantial obstacles. It is quite unclear that the plaintiffs could then have shown the existence of any actual controversy of which a court could take jurisdiction, or that they could show that the relief requested had not already been granted in substance.[79] See *Brownlow v. Schwartz*, 261 U. S. 216.

79. The Department itself took the position that relief had already been granted, and that as one claimant was advised, "it would be unnecessary to revoke" a previous assessment work decision as it was "without authority of law . . . [and] without any effect on the title arising from the location of the claims" (Pl. Ex. 180; A. 199-200).

B. In its decisions in *Krushnic* and *Virginia-Colorado* this Court twice rejected the arguments now urged by the Government and set aside assessment work decisions indistinguishable from the 1928-1931 decisions here.

The basic legal issue presented in the Department's campaign to declare oil shale claims invalid for failure to perform annual assessment work was whether, and if so, in what circumstances, an oil shale claim was or could be forfeited to the United States because of such a default. That question was twice before this Court a generation ago. The Court of Appeals indeed made explicit its view that the Government's contentions now were simply the long-delayed echo of an argument twice made and rejected.[80] In its brief in the Court of Appeals the Government, naturally, did not urge a direct departure from this Court's previous decisions. That overt step it now takes here, urging in Point II of its brief that the *Virginia-Colorado* decision be "limited" (on reasoning conceded by the Government to be "tortuous", p. 47)[81] or overruled. In advancing the argument that the decision be overruled, the Government does not add anything new or material to the considerations before the Court on the previous occasion. The Government seeks, however, to avoid the full force of history by insisting that the *Virginia-Colorado* decision alone be revisited (Brief, p. 48, note 21). As will appear, however, the significance of that decision can be under-

80. "These cases on appeal are like a voice out of the past with mining locations dating from 1918, with the clearly established legal propositions directly applicable to them and the matter thought to be at rest. . . ." (A. 445)

81. The Government is properly hesitant in suggesting that the decision can be limited, for the facts by which it would circumscribe the decision were not significant in either the reasoning or the result. See p. 96 n. 123, below.

stood only in the light of the earlier decision in *Krushnic*. We therefore first consider the relationship between the two decisions, before turning to the factors which would make any departure from them inappropriate and unsound.

Although the Government now presses the view that the two cases have no necessary relation, the summary of the Government's argument to this Court in *Virginia-Colorado* took as its starting point a definition of the question presented as "the precise question which was reserved in *Wilbur* v. *Krushnic*" (Brief for the Petitioner, p. 5). Government counsel there saw what Government counsel here denies. In consequence of that error, the Government makes another in arguing that in *Virginia-Colorado* this Court in its decision, and the Department of Justice in its argument, both "assumed"—and wrongly—that a mining claim "could not be challenged by the United States under any circumstances for reason of failure to do the required annual labor" (Brief, pp. 48-49). What the Government here takes to have been airily and negligently *assumed*, had in fact been squarely *decided* in *Krushnic*, and decided adversely to the Government. The Government's argument here (Brief, pp. 49-57) differs hardly even in detail from the Department's reasoning in the *Krushnic* case and the argument by the Government in this Court in support of that decision, all of which this Court there considered and rejected as error.

The question raised in *Krushnic* was whether non-performance of assessment work on a claim for a leasing act mineral, valid when the Mineral Leasing Act went into effect, caused a forfeiture of the claim. The rationale of the Department's view that non-performance did forfeit the claim is set forth in clear terms in the first Departmental decision by First Assistant Secretary Finney:

"[The assessment work charge] is founded upon the doctrine that in view of the provisions of section 2324, Revised Statutes, requiring the performance of annual assessment work, and the excepting clause in section 37 of the leasing act, a valid mining location made for any of the minerals specified in said act and unperfected at the date thereof by a certificate of entry can not be perfected, but is forfeited upon failure to fulfill the statutory requirement as to annual labor and improvements, and the land therein becomes subject to disposition under the leasing act.

• • •

"Section 37 of the leasing act affords notice to all persons interested in mineral locations containing the minerals mentioned therein of the conditions under which they may maintain their claims and protect the deposits claimed from its operation. There is no warrant for reading into its saving clauses the statutory provision as to resumption of work of the original locator before hostile entry by another. This seems clear when such provision is considered in connection with its context.

• • •

"It is plain that the provision relating to the resumption of work is a restriction imposed upon the right of relocation. It applies only to claims that could be relocated but for the resumption of work. It has no application to lands no longer subject to relocation, or to the operation of the general mining laws, but withdrawn from such operation and subject to other disposition for a public purpose. The defaulting claimant can not restore a lost estate in such lands by resuming annual labor and improvements at a later time." (52 L.D. at 285-87)

For support for the crucial holding that a forfeiture occurs "upon failure to fulfill the statutory requirement as to annual labor" (52 L. D. at 286) Finney relied upon *Cronberg* v. *Hazlett*, 51 L. D. (1924), and *Interstate Oil Corporation and Frank O. Chittenden*, 50 L. D. 262 (1925), two of his own prior decisions as First Assistant Secretary.[82] Those two decisions are instructive upon the Government's argument here, for each of them represented an expression of the theory that a withdrawal under the Pickett Act (in *Interstate*) and the Mineral Leasing Act (in *Cronberg*) operated to work an automatic forfeiture of a previously located claim upon a default in the performance of assessment work.[83] In Finney's words in *Interstate*, a consideration of the savings clause in the Pickett Act (Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 142)

> compels the conclusion that the withdrawal in question was intended to be of a continuing nature and to attach immediately upon the default of any person having at the time of its inception a then subsisting and valid claim. (50 L.D. at 266)

82. They, together with two other Finney decisions of the same era, *United States* v. *Ruddock et al.*, 52 L.D. 313 (1927), and *Standard Shales Products Co.*, 52 L.D. 522 (1928), are principal bulwarks of the Government's argument to this Court (Brief, pp. 55-56). Not only were all four of common authorship, but *Standard Shales* was decided explicitly upon the basis that the Commissioner's view there, which Finney reversed, "is not in harmony" with what was said in *Interstate* and *Krushnic*, 52 L.D. at 524. In short, the several citations do not represent independent consideration of the point, but rather reiteration of the same point by the same spokesman.

83. Neither decision thus has any bearing on the specific question considered in *Virginia-Colorado*—whether the Government acquired any rights by posing as a rival locator which it did not automatically get upon default in the work. There was thus no occasion to cite them in *Virginia-Colorado*.

In *Cronberg* he construed Section 37 of the Mineral Leasing Act as making it "clear that Congress intended that [a claim] . . . should be forfeited to the United States in the event of a failure of such claimants after the date of the act to fulfill the requirements [as to assessment work]" (51 L. D. at 106-07), a view which Finney noted was "in harmony with" his prior opinion in *Interstate*.[84]

These decisions were cited and relied upon not only by First Assistant Secretary Finney in his *Krushnic* decision, but they, together with *E. C. Kinney*, 44 L. D. 580 (1916),[85] were heavily relied on by Secretary Work in his lengthy opinion on rehearing in the *Krushnic* case, 52 L. D. 295, 306, an opinion which canvassed in detail the substance of every contention of law and policy now urged upon this Court by the Government. These decisions were also cited in the Government's brief to this Court in *Krushnic* (Brief for the Petitioner, pp. 15, 18, 19, 33).

It is of course too plain for dispute that those arguments mounted by Secretary Work, in sustaining Finney's conclusion, were the direct focus of this Court's attention in *Krushnic*. There is no suggestion, and no basis for one, that this Court ignored or failed to consider these points, and the fact that the printed summary of the Government's argument carries the citations of the three cases above discussed (see 280 U. S. at 308) is additional evidence that the Department's rationale received careful attention. Given the tenor of this Court's decision in

84. And very similar to the point urged at pages 57-63 of the Government's brief. Indeed, the Government brief (p. 9) argues explicitly that the "solution . . . accepted by Congress in 1910" in the savings clause in the Pickett Act "was carried forward into the [Mineral Leasing Act]," which is Finney's rationale.

85. Likewise cited by the Government here (Brief, p. 52).

Krushnic it necessarily rejected not only the result reached by the Department, but the reasoning which underlay it, as well. That conclusion, to which a consideration of this Court's decision alone would point, is reinforced by the further fact that, after this Court's decision, the Department overruled both *E. C. Kinney* and the *Interstate* decision, so far as in conflict with this Court's decision. 53 L. D. 228, 230. Secretary Wilbur there stated that the "reasons" expressed in those cases

> both of which were relied upon by the Government in the *Krushnic* case, are clearly incompatible with the Supreme Court's opinion therein, and therefore cannot be any longer regarded as precedents and should not be followed.

Secretary Wilbur is thus himself a witness that there is no force in the Government's present suggestion that *Virginia-Colorado* was based on a crucial mis-assumption. On the contrary, it followed from an explicit decision by this Court in *Krushnic* rejecting the contentions which the Government here strives to suggest present questions of first impression.

What was left for decision in *Virginia-Colorado* was thus a narrow question, indeed. It was simply the point whether the result announced in *Krushnic* would be affected if, instead of relying on the default in assessment work itself, the Department moved affirmatively to post the claims and file charges during a hiatus in the performance of the work. Though not the same acts which a private relocator would perform,[86] the new procedures

86. Under the statute a relocation is nothing but an original location made on ground previously embraced within a prior located claim. For a placer claim, the "relocator" would thus proceed among other steps to record a certificate of location, something the Depart-

reflected the Secretary's determination "to test out the extent of the authority (if any) left to us by the Supreme Court decision" in *Krushnic* (Pl. Ex. 47; A. 96). That the Secretary should have lacked confidence in the result to be expected from the new procedures is understandable: when the claimant in *Krushnic* had suggested that the Department ought to have to behave like a rival locator, the contention had been summarily rejected as "not supported by any authority in point nor can the reasoning be accepted as sound." 52 L.D. at 285.

Contrary to the implications of the Government's argument here, the same policy considerations were presented again to the Court in *Virginia-Colorado* as had been urged in *Krushnic*. Indeed, the Government's argument about the "practical effects" to be expected from a decision adverse to the Government, as made in its brief in *Virginia-Colorado* (pp. 15-16), largely repeated the argument made in the *Krushnic* brief (pp. 35-36, 38-39), and that in turn reflected the points urged by the Secretary in his opinion on reargument in *Krushnic* (see 52 L.D. at 306-307).[87] On the legal point presented, however, the Government's effort was to distinguish the *Krushnic* case, not to attack it frontally. To have raised again, as the Government's brief here suggests it somehow inadvertently or carelessly failed to do, the authorities discredited by *Krushnic*[88] would of course have served only to underscore

ment never did do. On the other hand, the private relocator would not initiate a litigation in the Department to test his right to relocate by virtue of a default in assessment work on the prior claim, which the Department did do; the statute explicitly deprived the Department of any authority to hear such a case.

87. And reiterated in the Government brief here (see pp. 42-45).

88. In significant part these decisions had meanwhile been overruled by the Secretary on the authority of *Krushnic*.

how identical *Virginia-Colorado* and *Krushnic* were. To emphasize that identity to a Court in 1935 six of whose members had participated in the unanimous decision in *Krushnic* would have been to invite a summary disposition adverse to the Government.

C. The mining statutes and the Mineral Leasing Act cannot properly be construed to permit the Government to terminate a mining claim for default in assessment work.

The Government's present argument is substantially the same argument presented to this Court and rejected by it in the *Krushnic* decision. What little remained after *Krushnic* was decided adversely to the Government in *Virginia-Colorado.* As the facts show unequivocally, Secretary Ickes promptly acted to establish a Department policy consistent with the result announced by the Court and that policy was followed and consistently applied for twenty-five years thereafter, until *Union Oil.* The Government now moves to reargue the point of statutory construction thus settled for so long, although conceding that decisions of this Court construing statutes are not often subjected to re-examination.[89]

Even if there were a clean slate on which this Court could write, it still should rule that the relevant statutes gave the Government no basis to terminate a mining claim for default in performance of assessment work. This was well recognized as the general rule under the Mining Law; the supposedly contrary line of authority urged by the Government in *Krushnic* and again here as establishing an exception where the Government has or is asserted to have

89. Petition for Certiorari, pp. 16-17. The Government elsewhere recognizes that stability in the law is particularly desirable where ownership of real property interests is concerned (Brief, p. 42).

a specific competing use for the land in fact provides no applicable contrary basis for decision; and the text and the legislative history of the Mineral Leasing Act afford no ground for the Government's contention. On the contrary, the result reached in the prior decisions of the Court is compelled alike by the established law, and the policy considerations implicit in the governing statutes. There is thus joined to the normal reasons for desiring to adhere to prior decisions on a point of statutory construction the specific consideration that the prior decisions under the assault here were right.

(i) Under the mining law the Government had no general interest in the performance of assessment work.

As shown above,[90] the applicable law developed before there was any federal mining legislation, and the law with respect to assessment work served only to test priorities among rival private claimants to the same land. The United States had no interest in performance of the work, and Interior had no jurisdiction with respect to it. This continued to be so when in 1865 Congress first legislated and made federal courts available to enforce the miners' customary Law of Possession,[91] and when in 1866-1872 Congress enacted the federal mining statutes that continued in effect beyond the location of the oil shale claims in suit.[92]

90. Pp. 5-19, "The Legislative Setting of the Assessment Work Controversy."

91. 13 Stat. 440; *cf. Lownsdale* v. *Parrish*, 21 How. 290; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505.

92. The Mining Act of 1866, 14 Stat. 251; The Placer Act of 1870, 16 Stat. 217; The Mining Law of May 10, 1872, 17 Stat. 91, 30 U.S.C. 21 *et seq.*; see generally Swenson, at pp. 716-723.

While codifying the prevailing assessment work test of priorities among rival private claimants ($100 worth of work per year), the statutes also specified that a prior locator could preclude subsequent relocation by resuming the assessment work, thereby clearly signifying that a lapse in the work did not, so far as the United States was concerned, terminate a mining claim.[93] While thus leaving assessment work to serve only to test private priorities, the statutes specified a similar but distinct standard to test, in effect, priorities between the United States and a claim owner. To become eligible to receive transfer by patent of title from the United States, the claim owner would have to devote $500 worth of labor or improvements to development of his claim.[94] The statutes did by implication authorize Interior to determine whether patents should issue, *e.g.*, whether a discovery of valuable minerals had been made and whether the $500 requirement had been satisfied, but did not confer authority or jurisdiction on Interior to determine whether assessment work had been performed. Indeed, in detailing how a mining claimant could, by filing an application in a land office, obtain a patent, the statutes specifically provided that if a dispute arose under the miners' customary Law of Possession (and assessment work disputes could arise only under that Law), Interior was to stay its hand, refer the dispute to a court "of competent jurisdiction," and to be guided by the final judgment of the court in further processing of the patent application.[95]

93. Act of May 10, 1872, sec. 5, c. 152, 17 Stat. 92, as amended, 30 U.S.C. 28.

94. Act of May 10, 1872, 17 Stat. 92, as amended, 30 U.S.C. 28.

95. See, *e.g., Iron Silver Min. Co.* v. *Campbell,* 135 U. S. 286, 299; Act of May 10, 1872, 17 Stat. 92, 30 U.S.C. 29, 30. State courts had long been courts "of competent jurisdiction," see, *e.g., Erhardt* v. *Boaro,* 113 U. S. 527, 535, and Congress had acted in 1865 to make federal courts ones "of competent jurisdiction." 13 Stat. 440.

Although the Government's brief forbears to say so explicitly, there appears to be no serious controversy that as a general matter the performance of assessment work, whether before or after the enactment of the Mineral Leasing Act, has been a subject in which the Government has no interest.[96] That agreement between the parties reflects the decisions and regulations of the Department, both before and after the enactment of the Mineral Leasing Act of 1920, which recognize that the mining laws created no rights with respect to the performance of assessment work which the Secretary had a duty to protect or enforce. Such work was immaterial so far as the United States was concerned, and insofar as private claimants were concerned the question was expressly committed to the exclusive jurisdiction of the courts. See, *e.g.*, *P. Wolenberg*, 29 L. D. 302 (1899); *Nielson* v. *Champagne Mining and Milling Co.*, 29 L. D. 491, 493 (1900). Interior's regulations have always explicitly conceded as much. *Regulations*, 37 L. D. 757, 769 (1909); *Regulations*, 49 L. D. 58, 73 (1922). The current version of the regulations, 43 C.F.R. §3420.4 (1969), provides that annual assessment work "is . . . solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."

A sampling of statements by Interior just prior to the enactment of the Mineral Leasing Act shows its recognition, in the specific context of oil shale, that the question

96. At page 32 of its brief the Government says that "the proposition that . . . the Department has not . . . claimed jurisdiction to enforce the assessment work requirement of the Mining Act . . . has [never] been entirely true." The negative construction is pregnant with the concession that broadly speaking the proposition is very true, indeed.

of assessment work was no concern of the Department. Thus, Secretary Lane himself advised Mr. J. B. Jenson of Salt Lake City in a letter of October 23, 1918:

> I am in receipt of your letter dated October 2, 1918, and making inquiry as to the necessity for performing annual assessment work on some oil shale lands in Wyoming, which you and associates are claiming under placer mining locations made in 1917 and 1918.
>
> • • • • •
>
> As a general rule matters involving questions of assessment work on mining claims arise between adverse claimants to the same mineral land and go only to the right of possession, the determination of which is committed exclusively to the courts (Pl. Ex. 51; A. 99-100).

The Assistant Commissioner of the General Land Office, in a letter of January 20, 1919, to Chris C. Dere of Grand Valley, Colorado (then the center of oil shale activity), wrote to the same effect: that annual assessment work was "solely a matter between rival or adverse claimants . . . and goes only to that right of possession, the determination of which is committed exclusively to the court" (Pl. Ex. 52; A. 100). First Assistant Secretary Vogelsang made the same point in a letter of October 24, 1919:

> With respect to the performance of annual assessment work on mining claims, I have to advise you that it has always been held that this is a matter between rival or adverse claimants to the same tract of land, and within the jurisdiction of the courts and not of this Department (Pl. Ex. 289; A. 271).

Interior continued throughout the assessment work controversy itself to recognize that insofar as the mining

statutes were concerned, default in assessment work did not terminate a claim and Interior lacked authority to consider assessment work questions. Indeed, the Secretary's ruling in *Krushnic* itself, 52 L.D. 295, 301 (1928), while expressing the view that the law was otherwise with respect to Leasing Act minerals, acknowledged that "There is no doubt that the doctrine above quoted [that a locator's rights after resumption of assessment work were precisely what they would have been if no default had occurred] continues to be the law as to mineral lands subject to location and purchase under the general mining law . . ." Later the same year First Assistant Secretary Finney ruled, citing the Secretary in *Krushnic,* that

> The long-established rule that the department has nothing to do with the question of the performance of annual assessment work on mining locations made upon lands that continue to be subject to location, entry, and purchase under the mining laws . . . still remains in full force and effect. (*Gorda Gold Mining Co.* v. *Bauman, On Petition,* 52 L.D. 519, 521-522 (1928)).

Similar acknowledgments appear in *Proceedings Against Mining Claims Within the Area of the Boulder Dam Project, Instructions,* 53 I.D. 228 (1930), and *Challenges to Validity of Mining Claims in National Parks,* 53 I.D. 491 (1931).

Statements to the same effect, although unqualified as to Leasing Act minerals, appear immediately following this Court's ruling in *Virginia-Colorado,* and continue until *Union Oil.* For example, Commissioner Johnson of the General Land Office wrote on July 25, 1935, that "this office has no jurisdiction over questions relating to the performance of annual assessment work on mining claims,

such questions being committed exclusively to the courts" (Pl. Ex. 55; A. 102) and to the same effect on July 20, 1935, July 26, 1935 and July 29, 1935 (Pl. Exs. 57, 56, 58; A. 103-104). See also Under Secretary Chapman's letter to Senator Ecton in 1946 (Pl. Ex. 59; A. 104-105); "whether the work done is of a nature that would be considered assessment work is not one within the jurisdiction of this Department but is for the appropriate court to determine. . . ." More recently, the Under Secretary wrote on June 13, 1958, to Representative Engle, Chairman of the House Committee on Interior and Insular Affairs, expressing Interior's views on pending legislation which among other matters would have suspended assessment work for a year. He there said: "The performance of assessment work is not of direct concern to this Department, since the failure of a locator to perform the required labor or make the required improvements annually does not of itself forfeit his claim, but merely renders it subject to loss by relocation." 1958 U. S. Code Cong. & Adm. News 3819.

(ii) Contrary to the Government's contention in *Krushnic*, which is renewed here, there was and is no well established exception giving the Government an interest in the performance of assessment work where there is a subsequent withdrawal of the land.

While at least *sub silentio* conceding that generally speaking the Department has no interest in the performance of assessment work, the Government asserts that beginning in the 19th century there developed a "rule . . . that the possessory right within an area subsequently withdrawn is valid against the Government only so long as it is maintained, including the performance of annual

assessment work" (Brief, p. 52). The critical point of the argument, that "maintenance" of the claim was held to include the performance of annual assessment work, is not, however, established by the cases cited, and there is scant support, indeed, for the assertion (p. 56) that "unpatented and unperfected claims had always been subject to defeasance by the United States for want of assessment work when the land was withdrawn without possibility of relocation." The Government rightly notes (*ibid.*) that "the 1920 Mineral Leasing Act did not, in fact, change existing law," but the existing law thus left unchanged had a character quite different from the Government's analysis.

The opinion to the Secretary of War of Attorney General McVeagh in *Fort Maginnis*, 1 L.D. 552 (1881), is taken as the fountainhead of the supposed "rule". The difficulty with that characterization is that, while the Secretary posed three questions for the Attorney General's opinion, none of them concerned assessment work, and the opinion itself does not refer to assessment work. The Secretary desired an opinion (1) as to whether mineral lands could be reserved for military purposes, (2) whether having been reserved the lands remained open to mining location, and (3) whether mining claims located prior to the reservation might thereafter be taken to patent. The Attorney General answered the first question yes and the second no. As to the third, he said that "so long as [the locator] complies with the conditions imposed by [the mining laws]" those laws confer possessory rights which, he notes, as "recognized by Congress are property of great value" (at 554). He thus concluded that

> where such rights have attached to mineral land in favor of the locator of a mining claim the land

> during the continuance of the claim (i.e., so long as it is maintained in accordance with law) . . . cannot, while that right exists, notwithstanding the title thereto remains in the government, be set apart by the Executive for other uses. (*Id.*)

The parenthetical reference to the maintenance of the claim is presumably the basis for the Government's argument here, but there is no mention of assessment work as comprehended within the term, and it could more reasonably be given significance as meaning so long as not worked out or abandoned. *Cf. Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 336. There is no reference whatsoever to assessment work by those words, and the suggestion in the Government brief (p. 52) that the words which the Attorney General did use in referring to "maintenance" meant assessment work is of course to assume the very conclusion for which the opinion is cited as authority.[97]

No such rule as the Government contends having in fact been stated in *Fort Maginnis*, it is clear that "subsequent rulings" could not, as claimed, have "extended that rule" to other subjects (Brief, p. 52). Moreover, an examination of the succeeding authorities cited by the Government will show that neither can they be taken as *sources* of the supposed rule. In *Yosemite National Park*, 25 L.D. 48 (1897), chronologically the next case cited, the questions presented for opinion by the Assistant Attorney General were as in *Fort Maginnis*, three: (1) the authority of the superintendent of Yosemite National Park to regu-

97. It should be noted, further, that the headnote to the opinion is equally barren of any reference to assessment work. It says in regard to the Attorney General's third point only that, "But where mining claims were legally located and held prior to such reservation, the miners' rights cannot be divested by taking the land for military purposes." 1 L. D. at 552.

late the working of valid claims within the Park perimeter, (2) as to when claims were to be regarded as lapsed or abandoned, and (3) as to the regulation of the miners' rights outside the limits of their claims, as in the construction of trails and cutting timber. After a general discussion of the rights arising from a mining location, the opinion answered the express questions put by saying that the superintendent had no authority to regulate the working of claims, and, on the second point, that the superintendent equally "has no authority to determine when such claims 'are to be considered as lapsed or abandoned'" (25 L.D. at 51). On that subject the Assistant Attorney General suggested that the superintendent be instructed that "in case any claim which was duly located and subsisting at the date of said act shall be made to appear to him as having been abandoned he report the facts in the case to the Secretary for his consideration and action" (at 52). The only reference to assessment work anywhere in the opinion is in the second of the three questions put, which the Attorney General takes from the inquiry propounded by the Superintendent:

> 2. In regard to determining when claims are to be considered as lapsed or abandoned, as by reason of failure to perform necessary assessment work, or to record the same.

It is noteworthy that the Attorney General did not himself adopt in his response the phrasing in the question. On the contrary, in suggesting that abandonment was the operative concept, the *Yosemite* opinion offered a construction in harmony with the reading given above to the concept of "maintenance" in *Fort Maginnis*.

The third authority, the Assistant Attorney General's opinion in *Navajo Indian Reservation*, 30 L.D. 515 (1901),

is equally far from constituting support for the Government's view here. Claims had been located within the area subsequently set apart as a Navajo reservation, but the facts showed that annual assessment work had not been performed on most of them. Upon a revival of interest in the minerals, work was resumed and conflicts arose between claimants under the original locations and claimants under purported relocations made after the establishment of the reservation. The Commissioner of Indian Affairs, concerned at incursions upon the reservation by the mineral claimants, recommended that only those claimants who could show a right based upon locations made prior to the reservation be allowed to go upon it, 30 L.D. at 517. The Attorney General concluded that the recommended course would commit the Department to the determination of competing rights to possession which "it has no jurisdiction to do . . . The determination of that right is committed by the mining laws to the courts alone" (at 520).

As in *Yosemite*, the opinion rests in no part on any consideration of assessment work. Indeed, in *Navajo* what is said about assessment work is quite contrary to the Government's contention here. The opinion quoted from a passage in a report of the Commissioner of the General Land Office which talked of "maintenance" of a claim, noting that perhaps the Indian Office might have reported the failure in assessment work "with a view to determining whether the claims were actually abandoned and forfeited" (at 516).[98] The Attorney General's opinion (see 30 L.D. at 518) refers to the possible conse-

98. With the recognition that after default in assessment work, abandonment remained something to be proved, should be compared the Government's suggestion that the two ought to be regarded as essentially synonymous (see Brief, pp. 44-45).

quence of "an abandonment or relinquishment of such claim" subsequent to the order creating the reservation; it does not talk of a default in assessment work. As is true of *Yosemite,* the *Navajo* opinion is not authority for the proposition that a failure to continue assessment work entitles the Government to forfeit the claim.

In their bearing upon the Government's contention that this Court's decision in *Virginia-Colorado* was the product of oversight—that, indeed, "it is entirely possible that the Court would have ruled the other way in *Virginia-Colorado* had it been apprised of this background" (Brief, p. 56)—*Yosemite* and *Navajo* share one other distinction. Both opinions were written by then Assistant Attorney General Van Devanter who, as a member of this Court, participated in the unanimous decisions in *Krushnic* and *Virginia-Colorado.*[99] With all deference, the suggestion that *Virginia-Colorado* resulted from some massive inadvertence is simply untenable. Equally so, in the circumstances, is the suggestion that these cases discussed above constituted a well-developed line of authority contrary to the conclusions reached in *Krushnic* and *Virginia-Colorado.*[100]

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99. Moreover, as the author of *Cameron* v. *United States,* 252 U. S. 450, he obviously did not share the view pressed by the Government here, that *Krushnic* and *Virginia-Colorado* conflict with *Cameron* on the scope of Interior's jurisdiction. He, as this Court recently noted, "as Assistant Attorney General for the Interior Department from 1897 to 1903, did more than any other person to give character and distinction to the administration of the public lands. . . ." *Best* v. *Humboldt Placer Mining Co.,* 371 U. S. 334, 336-337.

100. *Arid Land,* 32 L.D. 387 (1904), another case cited, was an instruction from Secretary Hitchcock concerned with the question of what lands were excepted from a withdrawal for reservoir sites or permanent water works at the time they were made, and not with a default subsequent to withdrawal; language that might appear to apply to the consequences of post-withdrawal failure to perform assessment work was thus not necessary to the decision. *E. C. Kinney,* 44 L.D. 580 (1916), a ruling by Assistant Secretary Jones on a claim

The remaining Department cases in this supposed "line of authority" are four decisions all rendered by Assistant Secretary Finney, the author of the first Department decision in *Krushnic*, see 52 L. D. at 283, who was himself on the Government brief in this Court. They reflect the same point of view expressed in *Krushnic*, and far from constituting independent authority for the Department's view there, or the Government's contention here, represent simply multiple utterances of the same view by the same spokesman.[101] The last authority, and the only judicial utterance cited as in point, is the decision in *Hodgson* v. *Midwest Oil Company*, 17 F. 2d 71 (8th Cir. 1927), a case heavily relied on by the Government in *Krushnic* and both distinguished and specifically rejected by the Court of Appeals. See *United States ex rel. Krushnic* v. *West*, 30 F. 2d 742, 745-46 (D. C. Cir. 1929).[102]

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for damages against the Reclamation Service for flooding a mine, says that the claimant "failed to comply with the requirements of the general mining laws . . . particularly with reference to the performance of the assessment work". It is not clear that the assessment work point was decisive of the result, and that part of the opinion appears to depend upon the mis-reading of *Navajo* as stating the conclusion that "default" in assessment work would terminate the claim, whereas Assistant Attorney General Van Devanter had talked of "abandonment or relinquishment".

101. The decisions, in chronological order, are those in *Interstate Oil Corp. et al*, 50 L.D. 262 (1924); *Cronberg* v. *Haslett*, 51 L.D. 101 (1925); *United States* v. *Ruddock, et al.*, 52 L.D. 313 (1927); and *Standard Shales Prod. Co.*, 52 L.D. 522 (1928). The last of the four depends upon *Interstate* and the Departmental decision in *Krushnic*, see 52 L.D. at 524; *Ruddock* in turn also rests heavily on *Interstate*, see 52 L.D. at 324.

102. The Government argument in *Krushnic* in this Court heavily relied on *Hodgson* (Brief, pp. 20, 37). After this Court's decision in *Krushnic* Interior realized that *Hodgson* and the four Finney decisions discussed above were no longer viable. Three of the four were promptly overruled; the fourth is at best a derelict. See *Standard Shales Prod. Co., On Rehearing*, 53 I.D. 42 (1930); *Proceedings Against Mining Claims Within the Area of the Boulder Dam Project, Instructions*, July 7, 1930, 53 I.D. 228, 230 ("The reasons expressed in *E. C. Kinney* . . . and for the holding in the *Chittenden* case . . . are clearly incompatible with the Supreme Court's opinion" in *Krushnic*).

(iii) The text, the context and the legislative history of the Mineral Leasing Act clearly refute the contention that the performance of assessment work was thereafter required upon pain of forfeiture of the claim to the United States.

Although the Government's brief devotes attention to some of the circumstances surrounding the consideration of a mineral leasing bill during the second decade of this century and to analysis of the supposed policies implicit in it, which are said to require a result contrary to that previously reached by two unanimous decisions of this Court, the Government is nowhere able to find express language either in the enactment itself or in the legislative history to aid its purpose. In this respect, the Government here has been no less diligent, and no more successful, than in the very similar presentations to this Court in the *Krushnic* and *Virginia-Colorado* cases.[103]

Section 1 of the Mineral Leasing Act of 1920, 41 Stat. 437-439, as amended, 30 U.S.C. 181, withdrew coal, phosphate, sodium, oil, oil shale and gas, from subsequent claiming under the mining laws. One might expect that any argument that this Act was intended, in addition, to withdraw prior located mining claims if and when assessment work were not performed thereon, would be based upon some asserted construction of this section. That, however, has not been the case, and there is no basis for such an argument. Curiously, the argument for that greater withdrawal has instead seized upon the "savings" or excepting clause at the end of the Act, Section 37, 41 Stat. 451, as amended, 30 U.S.C. 193. To read a savings

103. Thus, the discussion of the legislative material both in the Government's brief in *Krushnic* (Brief for the Petitioner, pp. 34-35) and here (Brief, pp. 59-62) focuses on the protection intended to be extended by the savings clause to those seeking minerals who had not yet made a discovery.

involved in the earlier decision in *Joshua L. Smith*, supra; *Winifred S. Schmitz*, 38 L.D. 587 (1910); *Lizzie Trask*, 39 L.D. 279 (1910).

Indeed, a decision in this later line of authority was rendered by the Department on the very eve of enactment of the Mineral Leasing Act. *James Morris*, 47 L.D. 326, decided January 20, 1920. In that case Morris had settled in 1909 on land included within a public water reserve created in 1917 under the Pickett Act. The plat of survey was filed in the land office on January 10, 1918, and under the statute Morris had three months to make application. This he failed to do, and the Commissioner held the entry for rejection. Assistant Secretary Vogelsang reversed, although the relevant savings clause in the Pickett Act stated that its terms "shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made", 36 Stat. 847, as amended, 43 U.S.C. 142. Said the Secretary, the withdrawal "is not such an 'adverse claim'" within the meaning of the decisions of the courts and the Department as would defeat the application.

There is thus no support for the Government's view in the Mineral Leasing Act itself or in parallel or analogous legislation. The legislative history materials on the Mineral Leasing Act itself to which the Government refers provide no better support for that view. As the Government notes, "the oil shale problem was a very small part of the context out of which the Mineral Leasing Act of 1920 arose" (Brief, pp. 58-59). The Government's argument seems to be (1) that Congress believed that no oil shale claims would be patented under the mining laws because substantial expenditures would be required to bring

about commercial production, (2) that Congress intended to terminate valid oil shale claims if the assessment work were not continuously performed, and (3) that Congress offered a "lease alternative" in order to relieve the claim owners of the financial burdens of performing assessment work. For none of these propositions does the Government cite any specific expression of intent, even by an individual Congressman, let alone any authoritative expression of intent such as a Committee Report or statement by one of the leading advocates of the legislation. None of these propositions has any logic, and all are refuted by the legislative history.

Under the mining laws, whatever obligation there was to do assessment work started with the discovery of valuable mineral deposits and ceased with the patenting of the claim.[111] Legal title then stood in the claim owner, and the claim could not be relocated, the United States had no further interest whatsoever in the land, and whether the claim owner produced minerals promptly, or spent forty years developing and improving processing technology, was solely for him to decide. To obtain patent and thereby terminate all assessment work obligations forever, the claim owner was required to invest only $500 worth of labor and improvements in developing his claim. The notion that it would be to the claim owner's financial advantage, instead of thereby obtaining fee simple title, to take a lease, even a long-term lease, with rental and royalty obligations which could be waived for five years at most and which might not be waived at all, and with the royalties subject to readjustment every twenty years *by the lessor*, has neither any practical basis nor support in the

111. See, *e.g.*, *Union Oil Co.* v. *Smith*, 249 U. S. 337, 348, 350, 353; Act of May 10, 1872, 17 Stat. 92, as amended, 30 U.S.C. 28.

legislative history. Yet that notion is vital to the Government's argument.

Even if the purpose of the lease alternative were to make leasing more attractive financially than patenting, it does not follow that, as the Government argues, Congress intended to require mining claimants to do work each and every year until or unless patent was applied for and obtained. Congress could very likely have thought that the lease alternative relieved the claimant of investing the $500 worth of work required as a condition to obtaining patent under the mining laws. Of course that patent work did not have to be done in successive years in $100 increments, and it was equally well established that a failure to perform patent work did not create any right of forfeiture in the United States.

Although it is true as the Government notes that Congress was primarily concerned with oil claims and preservation of rights therein, the Government is wide of the mark in asserting (Brief, pp. 26-27) that the legislative history as to preservation of rights in oil shale claims consists principally of the remark that claims could be exchanged for leases. What actually happened begins in 1916, when the Secretary of the Interior wrote to Senator Myers, then Chairman of the Senate Committee on Public Lands, suggesting that oil shale be included in the leasing bill. E. C. Finney, then a member of the Department's Board of Appeals, and George Otis Smith, Director of the Geological Survey, testified in that year in the Senate hearings on the subject, emphasizing the prospective value of the oil shale deposits of the Green River Formation.[112]

112. Hearings before the Senate Committee on Public Lands on H.R. 406, "Leasing of Oil Lands," 64th Cong., 1st Sess. (1916), pp. 301, 320.

Testimony was also presented at the 1917 Senate hearings by a representative of the Bureau of Mines.[113]

In 1918 comprehensive hearings on oil shale were held by the House Committee on Public Lands.[114] A variety of witnesses, such as Professor R. D. George, State Geologist of Colorado, testified about the extent and potential of the oil shale deposits of the Green River Formation, reviewing the dwindling reserves of oil, the increasing demand for oil, the successful mining of shale oil and retorting of shale oil and by-products in Scotland, private and governmental activity looking to development of a domestic shale oil industry, and the resulting value and importance of the oil shale deposits of the Green River Formation.

A number of oil shale claimants presented their views to the Committee; they uniformly opposed inclusion of shale oil in the leasing bill, even if the leasing terms were to be very liberal, and urged that oil shale remain open to location and patent under the mining laws.[115] They surely did not regard leasing as financially preferable to patenting or think the patent requirements onerous: "To allow shale-bearing lands to go to patent would be an inducement to capital."[116]

The Committee also received substantial evidence that Interior regarded oil shale claims located in good faith as eligible for patent.[117] The Chairman noted however that as

113. Hearings before the Senate Committee on Public Lands on S. 45, "Leasing of Oil Lands," 65th Cong., 1st Sess. (1917), pp. 250 *et seq.*

114. Hearings before the House Committee on Public Lands on H.R. 3232 and S. 2812, "Oil Leasing Lands," 65th Cong., 2d Sess. (1918), pp. 811-1241.

115. See *id.* at pp. 818, 828, 831-832, 883-887, 906-907, 909-914, 1120-1123.

116. *Id.* at 887.

117. *Id.* at 818, 828, 897, 904, 905.

long as claims remained unpatented there would be uncertainty as to title, that this uncertainty might impede financing of large oil shale production complexes, and that the quick security of title that a lease would afford might therefore be desirable. The Chairman's views were discussed at some length; the "lease alternative" to existing claims was advanced solely as providing secure title, and no mention was made of any supposed savings in patent development work, which the oil shale claimants were, as noted, eager to do.[118] It seems clear then that the provision of a leasing alternative was intended as a convenience for those claimants, if any, who might want to avoid the delays, which then[119] as now could be over a decade, in obtaining patent.

The Government's argument that the provision of a leasing alternative logically signifies an understanding that otherwise many years of assessment work expenses would be incurred before commercial production came about, cannot conceivably be applied to oil, of which "flush" production generally followed promptly upon discovery. Yet the Congress provided for a "lease alternative" to perfected oil claims,[120] and did so before it did so for oil shale. As agreed here, Congress concentrated on oil claims; it was quite natural to pattern the oil shale provisions of the leasing bill after the oil provisions.

118. *Id.* at 909-914.

119. See, *e.g.*, *id.* at 913-914.

120. Act of Feb. 25, 1920, Secs. 18, 19, 41 Stat. 443-445, as amended, 30 U.S.C. 227, 228. The obvious reason for such an alternative was to afford security of title, thereby avoiding long delays and uncertainties about patenting. See, *e.g.*, Roberts, *Salt Creek* (W. H. Kistler Stationery Co., Denver, Colo., 1956), Ch. IX, pp. 135-158, *"Government Leases Replace the Placer Claims, 1919-1921"*. As Roberts notes, *id.* at 159, "The issuance of the government leases opened the way for an intensive drilling campaign throughout the big productive area of the Second Wall Creek Sand."

It seems clear then that Congress did not intend to alter the mining laws so as to forfeit oil shale claims if the assessment work were not thereafter continuously performed. Indeed, the legislative history is clearly and precisely to the contrary. In the debate in the House immediately preceding adoption of the conference report Representative Taylor of Colorado, one of the managers of the bill on behalf of the House (see 59 Cong. Rec. 2709, 66th Cong., 2d Sess., February 10, 1920), made clear beyond speculation of the kind in which the Government indulges, that the Mineral Leasing Act was not to be given a construction which would bring consequences upon then validly existing claims which would not have befallen them had the bill not been enacted. Mr. Taylor, after referring to the fact that the bill represented the adoption of a leasing policy, observed:

> Yet the Senate and the House have both always retained in every bill of this kind the provisions of section 37 and expressly recognized and legalized and attempted to affirmatively protect the property and legal rights under the laws as they are now and have for over 40 years been on our statute books of the honest prospectors, the bona fide locators in good faith, and holders of rightful claims, claims that are valid and existing under existing laws at the date of the passage of this act. Those claimants, even though they may not have perfected a legal discovery under the laws, are entitled to go ahead and maintain and perfect their claims under the present existing laws and obtain a patent to their lands *just as though this bill had never been passed.* I hope no court or Federal department will ever attempt to deny to these people the rights which Congress looks upon as vested and is attempting in section 37 to guarantee to them. (59 Cong. Rec. at 2711-12) (emphasis supplied).

The intention of Congress can of course receive no proper implementation if, after passage of the Mineral Leasing Act, a default in performance of assessment work is held to have consequences—the assertion of an adverse claim by the Government—which, had the bill never been enacted, could not plausibly be claimed to arise.

POINT II

The District Court and the Court of Appeals rightly held that the department lacked subject matter jurisdiction to render the 1928-1931 assessment work decisions against the claims in suit.

It is necessarily common ground that the absence in the Department of statutory authority—subject matter jurisdiction—to conduct the assessment work proceedings would render the resulting decisions, including those in 1928-1931 involved here, subject to attack, whether direct or collateral. In the words of the District Court's opinion they were "wholly nugatory, need not be appealed, and cannot be res judicata" (A. 46). As the Government notes (Brief, p. 28), the principal ground of decision below was the Department's lack of jurisdiction.

The Government argues here that the courts below erred, and advances that contention in two aspects. It says first, that this Court's prior decision in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639, which was a principal reliance of the courts below, did not constitute a ruling on the Secretary's jurisdiction, but was instead only a holding that the Secretary had committed "error in construing the maintenance provision" of Section 37 (Brief, p. 4). The Government then seeks to jus-

tify that reading of *Virginia-Colorado* by the further argument that as a general proposition the Secretary has broad powers, relying here as in the Court of Appeals principally upon the *Cameron*[121] and *Best*[122] cases; that in particular the Department has the power to examine into the validity of claims when it has a competing use to which it wishes to put the land; and that still more specifically the Secretary must necessarily have had the power to construe and apply the Mineral Leasing Act, including Section 37. Inasmuch as the focus of the Government's argument is the prior decision of this Court in *Virginia-Colorado,* we first consider whether that decision, in the language used and the setting in which it was rendered, can plausibly be given a meaning other than as a ruling on the Department's jurisdiction. We then turn to show that giving the *Virginia-Colorado* decision its plain meaning as a ruling on the Secretary's jurisdiction involves no wrench of doctrine. On the contrary, the decision so read constitutes simply a particular application of the general rule that the Secretary has authority (jurisdiction) to act upon any matter where the statute creates a right which it is his duty to protect. Having, as has been shown, no duty with respect to the performance of assessment work, he has no jurisdiction to challenge its nonperformance.

A. The *Virginia-Colorado* decision was a ruling on the Department's subject matter jurisdiction.

The opinion of Chief Justice Hughes for a unanimous court in *Virginia-Colorado* is not long, its reasoning is not complex, and its language is characteristically straight-

121. *Cameron* v. *United States,* 252 U. S. 450.

122. *Best* v. *Humboldt Placer Mining Co.,* 371 U. S. 334.

forward. The operative passage occupies hardly three pages, and the Chief Justice made only the two points necessary to the decision. The first was that numerous decisions of the Court, most recently that in *Krushnic*, had made the "character and extent of the right" which arises from a mining location "well established". 295 U.S. at 644. While the mining law required the performance of assessment work, it was clear (paraphrasing and quoting from the *Krushnic* opinion) that prior to the Mineral Leasing Act assessment work was not required to maintain a claim against the United States. The first point concluded with a succinct summary of the grounds upon which the Department did have "authority" to challenge a mining claim:

> There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. *Cameron* v. *United States*, 252 U. S. 450, 460; *Cole* v. *Ralph*, 252 U. S. 286, 296; *Black* v. *Elkhorn Mining Co.*, 163 U. S. 445, 450; *Brown* v. *Gurney*, 201 U. S. 184, 192, 193; *Farrell* v. *Lockhart*, 210 U. S. 142, 147. (295 U. S. at 645)

The second point in the opinion is devoted to a consideration of the Mineral Leasing Act. It concludes that the "maintenance" provision of Section 37 is "manifestly" satisfied by a resumption of work,[123] noting that the plain-

123. The opinion nowhere suggests that having made preparations to resume, or having an intention immediately to do so, is material. The Government, following what it confesses is "somewhat tortuous" reasoning (Brief, p. 47), would have it that these facts, alleged in the bill in *Virginia-Colorado* and, by virtue of the demurrer, admitted, are decisive of the result in the case. Neither the opinion nor its rationale suggests as much. On the contrary, these facts would not

tiff's rights would then be just as if no default had occurred. The Chief Justice noted that "The Government invokes the new policy of the Leasing Act abolishing the practice of location", but observed that "the saving provision of §37 is a part of the policy of the Act" declared by Congress "with full understanding of the status of such claims under the prior law". *Id.* at 646. The second part of the opinion, in a construction obviously intended to parallel the first point, concluded with a succinct summary of what the Department did *not* have "authority" to do:

> We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. At 647.

The Government here, correctly we think, urges that the Secretary's powers in the areas to which Chief Justice Hughes pointed as within his "authority" are to be analyzed in terms of his subject matter jurisdiction (Brief, pp. 29-30). *Cameron* v. *United States,* 252 U. S. 450, is indeed both cited in the opinion in the passage quoted and quoted at length in the Government's brief (pp. 30-31).[124]

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have sufficed to defeat a private relocation, for while there has been some dispute as to whether the prior location may be maintained by the resumption of work after a relocation has been commenced but before it has been completed, it is clear that a mere intention or readiness to resume would not serve to protect the claim. See *Bunker Chance Mining Co.* v. *Bex,* 408 P. 2d 170 (Idaho 1965); 2 American Law of Mining §§7.30-7.33. Furthermore, the endless uncertainty which would be injected if the questions of "how ready", "how soon", and "how clear an intention" became material, and the evidentiary problems as to what would constitute sufficient proof of those elements, are heavy additional grounds for rejecting this suggestion.

124. The Government's other principal authority, *Best* v. *Humboldt Placer Mining Co.,* 371 U. S. 334, was of course not cited in *Virginia-Colorado.* But as the Government says (p. 31) it "reaffirmed" what had already been said in *Cameron.*

oil shale contests was suspended after April 1, 1933, "awaiting court decision on jurisdiction of the Department to challenge the validity of oil-shale locations for failure to perform annual labor thereon" (Pl. Ex. 44; A. 93).[130] Other references to the "jurisdiction" or "right" or "authority" of the Department to proceed on the assessment work ground appear in the evidence.[131] It cannot be reasonably questioned that the whole focus of the post-*Krushnic* controvery leading up to the *Virginia-Colorado* decision in this Court was the Department's jurisdiction.

In this Court itself, the case had that same emphasis. The Government brief in that case stated the question presented as "Does Section 37 of the Leasing Act of February 25, 1920, give to the Secretary of the Interior *power,* upon hearing, to cancel claims to oil shale lands" etc. (emphasis supplied).[132] Not only was the question presented stated in jurisdictional terms but the Government's argument itself was developed in similar terms. The Government argued that, although the Mineral Leasing Act did not expressly give the Secretary the authority to recover possession of mining claims in default of assessment work, "if the right of repossession exists in the Government," as the Government contended, "the broad authority vested in the Secretary of the Interior is suffi-

130. In similar fashion then Assistant Secretary Oscar Chapman postponed argument in a pending appeal in the Department where "the principal question presented relates to the jurisdiction of the Department to enter inquiry as to the performance of annual assessment work on oil shale placer locations . . . inasmuch as this question is now involved in the [*Virginia-Colorado*] case . . ." (Pl. Ex. 53; A. 101).

131. *E.g.*, Pl. Ex. 48; A. 97 (a 1930 letter from Assistant Secretary Edwards to counsel as to an appeal where "the principal question raised . . . [is] the jurisdiction of the Department"); Pl. Ex. 49; A. 97-98.

132. Brief for the Petitioner, p. 2.

cient to empower him to enforce that right" (Brief for the Petitioner, p. 16). The *Virginia-Colorado* case was thus squarely presented as a test of power: the very theory of the Government's case was that the Secretary's subject matter jurisdiction must be co-extensive with his statutory duty to inquire.[133] The case was presented to this Court so as to invite, if not indeed to require, a ruling on the Department's jurisdiction. The answer given in the opinion was thus precisely responsive to the question put.

Finally, as the voluminous evidence shows, the decision once rendered was acted upon by both the Executive and Legislative branches as a construction of the Secretary's jurisdiction.

B. The Department's power to inquire extends wherever it has a duty to act; having no duty to act with respect to the performance of assessment work, it had no power to inquire into it.

The prior decisions of the Court, in particular that in *Virginia-Colorado*, were not only plain rulings on the Secretary's jurisdiction. They stand, as such, in harmony with the principles reflected in numerous decisions of this Court which have had occasion to pass on specific aspects of the Secretary's power.

Here, as in the Court of Appeals, the Government offers in opposition a broadly stated argument as to the authority of the Secretary, supported only by the language of cases not one of which concerns assessment work and most of which have nothing at all to do with mining claims or the Mining Law. This breadth of focus blurs

133. This rationale was previously advanced by the Department in *Federal Shale Oil Co.*, 53 I. D. 213, 220 (1930): "The leasing act of necessity conferred jurisdiction to inquire into and determine this question [of assessment work]".

analysis. Such jurisdiction as the Secretary has to rule upon the validity of mining claims in contest proceedings is nowhere expressly conferred by statute, [134] it has instead been implied by necessity from the statutes concerned with public land to the extent required to give effect to them. Unlike the regulatory statutes which confer sweeping authority to grant or withhold licenses, franchises and the like upon considerations broadly stated in terms of "public convenience and necessity", the mining laws themselves, as we have shown, define the conditions under which valid claims are created and the Secretary plays no part in that creation. Indeed, as this Court stated in *Payne* v. *Central Pacific Ry.*, 255 U. S. 228, 236, the Secretary's broad power of control and supervision

> . . . of course . . . does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act.

Interior's jurisdiction to challenge mining claims is, in short, confined to inquiry whether the statutory conditions established by Congress as the basis of the grant have been met.

The soundness of that analysis is shown by the decision of this Court in *West* v. *Standard Oil Co.*, 278 U. S. 200. The conclusiveness of the Secretary's determination there was held by Mr. Justice Brandeis to depend upon the jurisdiction conferred, which in the critical passages in the

134. As this Court said in *United States* v. *Cameron*, 252 U. S. 450, 461, a precedent much cited in the Government's brief: "True, the mineral land law does not in itself confer such authority on the land department." Note the use here of "authority" in a jurisdictional sense. *Cameron* was heavily relied upon by the Government in *Virginia-Colorado*, and the opinion in the latter case was thus evidently addressed to the terms in which the *Cameron* opinion had been stated.

opinion is referred to as the Secretary's "authority" (*id.* at 220, 221). What the Court said was that when Congress imposes a duty upon the Secretary, such as to issue patent upon application of the claimant (*id.* at 218), it "by implication confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed" (*id.* at 219). When, however, the Secretary makes a determination which no duty requires him to make he acts "without authority" and his acts are therefore ineffective (*id.* at 221). Stated conversely, only where Congress has created a right which the Secretary has a duty to protect has the Secretary authority to act.

The authorities cited by the Government in support of the argument that the Secretary's jurisdiction is "all-inclusive" (Brief, p. 29) in fact support precisely the analysis urged here. *United States* v. *Cameron*, 252 U. S. 450, and *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, upon which the Government principally relies (Brief, pp. 29-32), were both concerned with the issue of "discovery", which is of course the very basis for the existence of a mining claim. Neither of those cases presented any occasion for rulings of the breadth contended for by the Government, and neither establishes the Secretary's jurisdiction as to assessment work. That *Virginia-Colorado* is not at war with the doctrine given recognition in *Cameron* is clear enough in principle, but it may also be observed that Mr. Justice Van Devanter, the author of the opinion for a unanimous Court in *Cameron*, was a member of the likewise unanimous Court in *Virginia-Colorado* (and *Krushnic*).

The other four authorities cited offer no better support for the Government's argument here. *United States*

v. *Schurz*, 102 U. S. 378, held that a homestead claimant was entitled to mandamus directing the Secretary to issue patent, against the Government's contention that the patent had been erroneously executed inasmuch as the land in fact lay within the limits of an incorporated town and was ineligible for entry. The Court said that the question whether the land was subject to location was "a question for the land-officers to consider and decide before they determined to issue . . . a patent" (at 401). The matter was therefore within their jurisdiction and, if erroneous, merely voidable, and not, as the Government contended, void. *Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, and *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, both concerned the power of the Secretary to make factual determinations necessary to give effect to statutory land grants. In *Nesqually* the question was the extent of the land which had actually been occupied as a missionary station; in *Rust* it was the classification of land as swamp land or not. Both decisions reflect the rationale that the Secretary's powers are co-extensive with the duties imposed upon him by the statute. In *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, the last authority cited by the Government, the issue raised was the homestead applicant's complaint that the Secretary had acted arbitrarily in dismissing his application for failure to supply adequate proof of the non-mineral character of the ground. The Court held mandamus inapplicable where the statute "gave him the power and imposed upon him the duty to decide for himself" (at 325).[135]

135. With this should be contrasted the Government's contention here that the grant of mandamus relief in *Krushnic* does not "carry with it the implication that the Court felt the Secretary had overstepped his jurisdiction . . ." (p. 35, n. 15).

Correctly viewed, the question of the Secretary's power to inquire as to assessment work depends upon his duty to act with respect to it. As has already been shown, it is clear in fact—and not controverted by the Government—that neither before nor after enactment of the Mineral Leasing Act has any statute conferred on the Department, or the Department asserted, any general interest in the performance of assessment work. The statute and the Department's regulations, its formal decisions, and more informal expressions, alike confirm the long-standing absence of any interest or power in that regard. The Government has unsuccessfully tried to establish a line of precedent, assertedly overlooked by counsel and the Court in *Virginia-Colorado,* under which the Government *did* assert an interest, and possess jurisdiction, in respect of the performance of assessment work on claims where the Government desired to put the land to other use. Both branches of that effort fall short. The Court and counsel in *Virginia-Colorado* were well aware of the supposed "precedents"; they had only recently been rejected as guides to decision in *Krushnic.* And they did not in fact represent a contrary line of applicable authority. See pages 66-70, 76-82, *supra.*

POINT III

To overrule *Krushnic* and *Virginia-Colorado* would do violence to thirty years of legislative reliance on the soundness of the decisions, would intrude upon the comprehensive consideration of the land laws now being given by the Public Land Law Review Commission, and would meet no need, for a continued recognition of the ineffectiveness of the assessment work decisions imposes no burdens on public land administration.

Beyond the considerations which, in principle, urge adherence to the statutory construction announced in the *Krushnic* and *Virginia-Colorado* decisions is the further fact that to depart from them would ignore the elaborate history of Congressional awareness and acquiescence in the result thus announced. It would involve a wrenching of the most clearly retroactive kind now to upset the premise for thirty-five years of legislative history—indeed, the Government, astonishingly, urges precisely the necessarily retroactive character which such a step would have as the reason for which this Court should undertake it (Brief, p. 64). A further reason for restraint which arises out of a consideration of the legislative role lies in the fact that the Congress has under present and active consideration a through-going revision of the public land laws, including the mining laws, with their provisions governing the requirement for assessment work and the question of the consequences of a failure to perform it.

In the same way, acceptance of the Government's argument that the decisions of this Court in *Virginia-Colorado* (and by necessary implication, *Krushnic,* as well) be over-

thrown, would bring, as another consequence, precisely the result in the Department's administration of the lands involved which the Government purports to fear: unsettling the established administrative practice. In advancing that contention, the Government misconceived the facts which show that consistency and reliability of administration—the touchstone for this argument (see Brief, p. 41)—will be served by precisely the contrary course; for successive Secretaries have acted for thirty years in the settled conviction that the old decisions were nullities.

A. Repeated efforts to overturn through legislation the statutory construction announced in the *Krushnic* and *Virginia-Colorado* decisions have failed of enactment; and a judicial overthrow of that doctrine would impinge upon pending Congressional review of public land legislation.

In considering the Government's argument here that this Court's unanimous decisions in *Krushnic* and *Virginia-Colorado,* themselves reaffirmations of settled law, should be overthrown and a contrary statutory interpretation now promulgated, it is appropriate to give weight to intervening legislative activity, which will be briefly described.

After this Court's ruling in *Krushnic,* Congress in 1930 and 1931 considered legislation that would have required assessment work be performed to avoid forfeiture of claims, as well as compromise proposals that would have made the assessment work requirement applicable only from a future date and would specifically have precluded Interior from complaining of defaults occurring prior to that date. Interior was then energetically pressing such

complaints and was reluctant to compromise,[136] and no compromise was enacted.

After this Court's ruling in *Virginia-Colorado,* Interior in 1936 began working on proposed legislation to require oil shale claim owners to do assessment work or forfeit their claims. See Pl. Ex. 188; R. 2043-2045. Such proposals were urged upon the Congress in 1939,[137] again in 1941 (Pl. Ex. 192; 211-212)[138] and in 1943 (Pl. Ex. 194; A. 213-215; Pl. Ex. 195; A. 216-217). Hearings were held on these proposals[139] but no satisfactory compromise as to how to change the law could then be reached.

The impetus for Interior's efforts to secure legislation came from the supposed difficulties of administering the Taylor Grazing Act on lands covered by unpatented oil shale claims. In 1945 Interior, noting that the desired

136. See Consolidated Hearings before the House Committee on Public Lands, *"Applications for Patent on Oil-Shale Lands,"* on H.R. 3754, H.R. 12802, H.R. 13191, H.R. 15002, H.R. 15130, H.R. 15131, H.R. 15132, Parts 1, 2 and 3, at pp. 44, 93, 95, 107-112, 115-116 (71st Cong., 2d and 3d Sess., 1930-31).

137. See Pl. Ex. 6; A. 68-69; H.R. Rep. No. 939 (on H.R. 6560), June 22, 1939 (76th Cong., 1st Sess). Secretary Ickes wrote Senator Murdock on July 25, 1941, that H.R. 6560 "was introduced at the request of the Department for the purpose of obtaining authority to clear up certain claims which . . . were saved by section 37 of the [Mineral Leasing] Act and because of a deficiency in the law it has not been possible to require that they be either developed or abandoned. The bill was passed by the House but because of amendments by the Senate Public Lands Committee which would have made the measure of questionable value it failed of enactment." Pl. Ex. 192; A. 211. Secretary Ickes then suggested that the matter be included in the hearings to be held pursuant to S. Res. 53, which it was. See n. 139 below.

138. The date of July 25, 1947 appearing at p. 211 of the Appendix is a typographical error for 1941. See R. 2050.

139. See Hearings Pursuant to S. Res. 241 (76th Cong.) before a Subcommittee of the Senate Committee on Public Lands and Surveys, Part 5, pp. 1957-1961; Part 13, pp. 3766-68, 3748-3785 (1942, 1943, 77th Cong., 2d Sess.).

legislation had not been enacted, determined that the difficulties could be overcome instead by administrative action.[140] Interior asserted the authority to regulate grazing on unpatented oil shale claims, received judicial support,[141] and has not encountered subsequent difficulty in that regard.

After the *Union Oil* decision of 1964 (71 I.D. 169), legislation to forfeit mining claims for nonperformance of assessment work was again introduced in the Congress.[142] In the interim period of accommodation, however, Interior had supported and Congress had in 1956 enacted a statute to facilitate the patenting of oil shale claims, legislation which imposed no requirement with respect to assessment work.[143] Moreover, two years later Congress made substantive amendments to the assessment work statute but gave the United States no rights in the premises. Act of Sept. 2, 1958, 72 Stat. 1701, 43 U.S.C. 28-1, 28-2.

In 1964, Congress determined that

> Because the public land laws of the United States have developed over a period of years through a series of acts of Congress which are not fully correlated with each other and because those laws, or some of them, may be inadequate to meet the current and future needs of the American people . . . , it is necessary to have a compre-

140. See Pl. Ex. 63; A. 113-116.

141. See *United States* v. *Etcheverry*, 230 F. 2d 193 (10th Cir. 1956).

142. H.R. 894, A Bill To Modernize the Mining Laws of the United States (89th Cong., 1st Sess., 1965).

143. Act of July 20, 1956, 70 Stat. 592, 30 U. S. C. 122. See S. Rep. No. 2524 (84th Cong., 2d Sess.); H.R. Report No. 2198 (84th Cong., 2d Sess.).

determinations are called in question by any decision here. There is no basis for the suggestion. It is said that the Secretary must be able to rely on his records. But if the record reflects a decision which it is known has no consequence (and it is the unquestioned evidence here that it was notorious within the Department that the oil shale assessment decisions were to be ignored), there is no administrative difficulty.

The contention that the cancellations served a basic public policy of clearing the land of "abandoned claims to facilitate their use in the public interest" (Brief, p. 42) is no better founded. It has not been policy in the public interest to clear the public lands of claims by contesting them on a ground which the Department lacks jurisdiction to advance. Moreover, abandonment has heretofore been thought a charge of which notice and an opportunity for a hearing is required. And the suggestion, that it was after effectively cancelling the claims that the Secretary "moved to promote those [other] uses," incorporates the wholly false implications that the Secretary thought that the decisions had effectively disposed of the claims and that the purported cancellations and other public land programs had a causal relationship.[149] The land within the

149. The contention is illogical as well as bad history. The post-*Krushnic* contest notices originally asserted that the United States "has taken possession . . . for purposes of holding for lease" under the Mineral Leasing Act (*e.g.*, Pl. Ex. 16; A. 71). Before any decisions were rendered, however, the withdrawal of April 15, 1930 had occurred (Executive Order No. 5327), and the field division was instructed to amend the notices so as to omit reference to the leasing act and to allege that the United States had taken possession "for its own uses and purposes" (Pl. Ex. 18; A. 73-74). The claims were not cancelled in 1931 to promote other specific uses. The 1930 withdrawal was not amended to permit oil and gas leasing until 1933 (Executive Order No. 6016, February 6, 1933). The Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C. 315, was of course enacted only in 1934. The Naval Oil Shale Reserves, referred to at p. 43 of the Government brief, include no portion of the claims here.

claims had of course been subject to oil and gas leasing *prior* to the assessment work contests, just as it was after the 1930 withdrawal was amended to permit a resumption of leasing for that purpose.[150] This history, which shows that in fact there was no relation between the assessment work contest decisions and oil and gas leasing, is heavily fortified by the Secretary's answers to interrogatories in this action that those leases were not issued in reliance upon the assessment work decisions (see pages 61-62, *supra*). Similarly, the grazing leases to which the Government's brief refers have issued without consideration of the effectiveness of assessment work decisions.[151]

The Government next suggests that if the claims were not effectively cancelled wholesale, they must be proceeded against individually in time-consuming and expensive contests. From one perspective this has no more meaning than it would to say that unless all red-haired suspects arrested by the police are presumed guilty it will be necessary to spend much time and effort in securing individual convictions. That of course is true, if not persuasive. The

150. While noting (Brief, p. 43) the issuance of oil and gas leases, the Government omits to note that most of those leases have either expired or were issued after the commencement of this action (Deft. Ex. GG, GG-1, GG-2; R. 7946-7947). The first oil and gas lease applications on any of the claims here in suit, on the Government's own statement, were filed only in 1951 (Supplement, pp. 156, 162, and 166), save for one lease application filed in 1945, and then withdrawn, for lands within some of the Camp Bird Claims (p. 166).

151. If further evidence is needed, it should also be noted that oil and gas leases and grazing permits have issued for lands within unpatented oil shale claims that have *never* been the subject of supposedly final assessment work decisions. See, *e.g.*, the four "Compass" claims involved in the *Napier* case. Three of the four were purportedly cancelled for default in performance of assessment work, whereas on the fourth, the Southwest claim, sufficient work was held to have been done and the claim was sustained on the merits. Oil and gas leases and grazing permits issued covering portions or all of all four claims. See Deft. Ex. E-E, I-I; R. 7943, 8069-8225.

argument is irrelevant in another sense, as well. It is advanced, it may be noted, in the course of the portion of the Government brief directed to the point that the decisions should not be held to be *void* because rendered in excess of jurisdiction. The argument made has no bearing on the topic under which it is presented. If the assessment work decisions are merely *erroneous*, they may be successfully set aside on direct review, and, equally if the decisions are set aside because void, the claims must be attacked in further contest proceedings. And even if neither void nor erroneous the decisions have no consequence, by the Secretary's own admission, to the extent of procedural errors made in the course of them.

The Government makes light of the procedural point material to many of these contests: the failure to effect service of notice of the contest. The extent of that failing, however, was large. Its dimensions are suggested by the fact that of the 257 oil shale claims that *were* involved in *Union Oil*, as those here were not, the Secretary himself has held that personal service was wholly defective as to 117, and partly so as to a further 101. *Union Oil Company of California, Supplemental Decision*, 72 I.D. 313 (1965). As to 218 of the 257 claims involved in the Departmental litigation—85% of those involved, there thus remain further issues to be tried on contest proceedings whatever the merits of the assessment work contest decisions. And contrary to the Government's reiterated statement that the Secretary has held that claims in contests with defective service "are subject to reopening as to any locator" not served (Brief, p. 29, n. 14), what the Secretary in fact has said is that to the extent of such defective service the old decisions were "without effect" or "had no effect". See,

e.g., 72 I. D. at 338.[152] One need not, that is, apply to the Secretary to "reopen" anything.

Lastly, the Government argues that if the decisions continue to be regarded as void, it would not be appropriate to conclude that a failure to respond in the contests or to resume assessment work constituted an abandonment of the claims. If, however, "there were a color of authority to [the Secretary's] actions", a different conclusion would be possible (Brief, p. 44). What "color of authority" could be given to the Secretary's actions under the language of the *Virginia-Colorado* decision which held in terms that what precisely the Secretary lacked was "authority" is

152. The Supplement to the Government's Trial Brief in the District Court, reprinted here as a supplement to its brief in this Court, shows that there were extensive interests in each of the claims in suit as to which the 1931 decisions in suit were thus "without effect." As the plaintiffs noted in their brief in the Court of Appeals, there was agreement as to the extent of ineffectiveness of the decisions for this reason, with the single exception that the Government supposed (see p. 125 of the Supplement) that the files in Contest 11761 contain a registry receipt dated July 17, 1931, signed by Stephen A. Post, the owner of a one-eighth interest in the Camp Bird claims. Under the principles stated in the supplemental *Union Oil* decision, that would have constituted effective service. In fact, the contest files contain no such receipt.

Correcting the Government's statements for that one, obviously inadvertent, error, it was common ground between the parties that the prior decisions were ineffective, on this procedural ground alone, to the following extent:

Contest 11757: the adverse decisions in Contest 11757 against the Bute claims were ineffective as to 11/16 of each of the Bute Nos. 1, 4-8, 11, 13-17, 22-26, 31-35, 38, 40-44, and 47; as to 12/16 of each of the Bute Nos. 2, 10, 19, 28, 37, and 46; and as to 13/16 of each of the Bute Nos. 3, 9, 12, 18, 21, 27, 30, 36, 39, 45, and 48.

Contest 11759: the adverse decisions in Contest 11759 against the Atlas claims were ineffective as to 7/16 of each of the Atlas Nos. 1-3, 7, 10, 12, and 18; and as to 9/16 of each of the Atlas Nos. 9 and 17.

Contest 11761: the adverse decisions in Contest 11761 against the Camp Bird claims were ineffective as to 12/16 of each of the Camp Bird Nos. 1-20.

impossible to perceive, whether the decision be read as going to subject matter jurisdiction or not.[153] Under either reading it is clear that an inference of abandonment cannot be based simply upon a failure in the midst of the Depression to contest a charge which the Secretary himself conceded would be subject to court test, and which, when that test reached this Court, was held beyond his authority to advance. It is equally clear that the question of discovery on oil shale claims, which although a subject neither of trial nor appeal below the Government adverts to (p. 45), is unaffected by any decision here. The Government presumably suggests—the meaning of note 18 is hardly clear—that a failure to respond to the contest or to perform assessment work is relevant to the question of the value which oil shale claims then had. Passing a number of relevant matters, of which the Depression is not the least significant, it must be obvious that the Secretary's subject matter jurisdiction can hardly be *assumed* to have been a material motivating force. Even were it now for the first time to be decided that he had in fact then possessed the power, any inference about a *perception* of value, which is what the Government necessarily must be talking about, would depend upon whether people then *thought* that he had subject matter jurisdiction. If they *thought* he did not, and that the contest proceedings were therefore nullities, their failure to resist them by hiring lawyers to go to Washington to appeal to the Secretary or to sue him in court,[154] would not prove a lack of appre-

153. This suggestion in the Government's brief assumes drastic alterations, in any event, in the well-established law of abandonment.

154. Prior to the Mandamus and Venue Act of 1962, 76 Stat. 744, 28 U.S.C. 1361, 1391(e)(1964), the Secretary could be sued only in the District of Columbia. See Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 Harv. L. Rev. 308 (1967).

ciation of value, even if they were now to be characterized as having been wrong in that view.

If the consistency and reliability of the administrative process have the importance claimed for it, the decisions below, not the Government's contentions, demand respect.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

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